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82-5466

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
Case No._____

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Do the Fourth and Fourteenth Amendments prohibit police from making a non-consensual warrantless night entry into a person's home to arrest him for a violation of a non-jailable traffic offense committed outside the presence of the police?

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OPINIONS BELOW

The decision of the Wisconsin Supreme Court in this case is reported as State v. Welsh, 108 Wis. 319, 321 N.W.2d 245 (1982) reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2101(c). The judgment of the Wisconsin Supreme Court reversing the court of appeals and affirming the circuit court order was entered July 2, 1982.

CONSTITUTIONAL PROVISION INVOLVED

THE FOURTH AS APPLICABLE TO STATES BY VIRTUE OF THE FOURTEENTH

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The basic facts are briefly outlined below. Their essence is that the Wisconsin Supreme Court has held that city police can, without a warrant and without establishing consent, enter a home to arrest a suspect on a driving while intoxicated charge.

The only issue on which certiorari is sought involves the warrantless entry into the home. Issues of probable cause to arrest, or whether the entry was consensual are not presented to this Court.

The petitioner, Edward Welsh, was arrested without a warrant at his home on April 24, 1978 between the hours of 9:00p.m. and 9:30 p.m. in the City of Madison, Wisconsin. He

was issued a citation for operating a motor vehicle while under the influence of intoxicants, contrary to § 346.63 (1)(a), Wis. Stats. 1977. He was in bed when the police arrived and after being arrested and taken to the police station, he refused to take a breathalyzer test as required by § 343.305(2)(b), Wis. Stats. 1977. The constitutionality of the underlying arrest is contested here.

On September 5, 1980, a hearing was held in accordance with § 343.305(8)(b), Wis. Stat. 1977, to determine whether the Petitioner's refusal to take the breathalyzer test was reasonable. At that hearing his attorney argued that the refusal was reasonable because the arrest was constitutionally invalid. The circuit court ruled that because the police had probable cause to arrest, and exigent circumstances existed, the warrantless arrest was valid. No finding on consent to enter was made by the circuit court. The court concluded that the refusal to take the breathalyzer test was unreasonable and accordingly ordered that the petitioner's operating privileges be suspended pursuant to § 343.305(9), Wis. Stats. 1977.

At the circuit court hearing regarding the validity of the arrest three witnesses testified as to the facts leading to the entry and the arrest: Patricia Welsh, the petitioner's wife; Richard Daley, one of the arresting police officers; and Randy Jablonic who observed the petitioner and the petitioner's car at the scene of the accident.

Jablonic testified that while driving within the City of Madison at about 8:30 p.m. on April 24, 1978, he saw a car traveling in front of him operating erratically. The car veered to the left leaving the road and came to a stop in an open field or cemetery. According to Jablonic it was raining, the ground was wet and visibility was poor. Jablonic stopped

at the scene of the accident and asked the driver of another car to call the police.

The Petitioner approached Jablonic's truck. Jablonic testified that the Petitioner's walk was very unsteady and that his speech was very controlled when he asked for a ride home. Jablonic refused stating that they should wait for help to arrive. Petitioner, however, left the scene. About 3-5 minutes after the Petitioner left the police arrived.

Madison Police Officer Daley testified that he was dispatched to the scene at 8:49 p.m.; and that upon his arrival he met Jablonic who gave him a description of the incident and the individual involved. He testified that Jablonic had a definite opinion that the individual was very obviously intoxicated.

Officer Daley quickly ran a license check and found that the vehicle was registered to the Petitioner who lived close by. He testified that he recalled having been called to the Petitioner's residence a week or two prior to that for an alcohol related distrubance for which he had arrested the Petitioner. He proceeded directly to the Petitioner's residence and arrived within one and one-half minutes.

Officer Daley and another policeman knocked at the door. The Petitioner's step-daughter answered. The officers asked to speak with the Petitioner. Daley testified that the step-daughter said something to the effect that the Petitioner had just stumbled in and opened the door and beckoned them toward the stairs. According to Daley as he and the other officer proceeded up the stairs the petitioner's wife appeared from the kitchen and asked what was going on. They informed her that there had been an accident and they strongly suspected the Petitioner was involved and that they wanted to speak to him

because they thought he was probably under the influence of intoxicants.

Daley testified that on the way upstairs the officers saw wet and muddy tracks going to the bedroom and in the bedroom they saw the Petitioner lying naked in bed and muddy pants immediately next to the bed. They asked the defendant to get up and put his pants on because they wanted to speak to him. While speaking with the Petitioner they noticed that the whole room smelled of alcohol; the Petitioner had a heavy odor of alcohol and his speech was slurred. While in the bedroom they informed the Petitioner that he was under arrest for operating a motor vehicle while under the influence of intoxicants. Officer Daley explained that when an arrest is made for operating under the influence the police must get the person downtown as soon as possible for a breathalyzer test because alcohol dissipates from the body after a certain period of time and the requirement is that the test be made within two hours of the violation.

The circuit court found that the officers arrived at the Petitioner's home within ten minutes after he left the scene of the accident and held that the arrest was valid because the police had probable cause and exigent circumstances existed for entering the defendant's home without a warrant to arrest him. The Supreme Court of Wisconsin affirmed this holding.

REASONS FOR GRANTING THE WRIT

This Court has never suggested that the Fourth Amendment allows a warrantless entry into a home to arrest for a non-jailable offense. The Supreme Court of Wisconsin authorizes such entries in deciding this case.

A first violation of the Wisconsin driving while intoxicated statute constitutes a civil forfeiture; a second

violation may be a misdemeanor, §346.63 (1); 346.65(2)(a)(1), and (2), Wis. Stat.1977. No evidence in this case indicates any prior offense under these statutes by petitioner, State v. Welsh, 108 Wis.2d 319, 342, 342 n. 1 (Abrahamson, J. dissenting). The majority opinion of the Wisconsin Supreme Court found probable cause and exigent circumstances that allowed entry without a warrant, or without consent.

The decision of the Wisconsin Supreme Court demonstrably conflicts with this Court's recent decision in Payton v. New York, 445 U.S. 573, 585 (1980). There this Court reaffirmed that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (citations omitted). That case does not justify entry here. The State made no showing that a warrant could not readily be obtained at the time and place needed. The Wisconsin Supreme Court's majority justified the police entry and arrest on the basis of fear that evidence of alcohol intake would be lost if there was a warrant requirement. That Court, therefore, applied a theory of hot pursuit and asserted that the need to preserve evidence constituted exigent circumstances justifying excusal from the warrant rule. The record contains no evidence on how long it would take to obtain a warrant wit hin the City of Madison between 9:00 and 9:30 P.M. Police discovered the petitioner within half an hour after the accident. Presumably evidence of intoxication, if any, would not be lost for the hour or so it might take to obtain a warrant.

Reasonableness, the ultimate test of the entry and arrest here is determined by balancing the need for the arrest and search as against the invasion that occurs, Camara v. Municipal Court, 387 U.S. 523, 536-7 (1967).

This Court should grant this petition; issue a writ of certiorari to the Supreme Court of Wisconsin, and it should

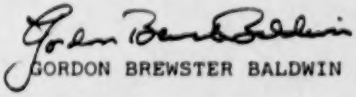
summarily reverse the decision of the Supreme Court of Wisconsin.

CONCLUSION

For the above reasons the petition for a writ of certioari should be granted.

Dated this 24th day of September, 1982

Respectfully submitted,



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STATE of Wisconsin, Plaintiff-Respondent-Petitioner,

v.

Edward G. WELSH, Defendant-Appellant.

Supreme Court

No. 80-1686. Argued March 1, 1982.—Decided July 2, 1982.

(Reversing 102 Wis. 2d 727, 308 N.W.2d 772.)

1. **Searches and Seizures § 33*—acts without warrant—probable cause.**
Evidence was sufficient to establish probable cause to justify warrantless entry of defendant's home, where evidence included testimony of eyewitness that defendant was intoxicated, where defendant left scene of accident and where officer recollected that he had been involved with defendant in recent alcohol related disturbance.

2. **Searches and Seizures § 33*—acts without warrant—reliability of informant.**
Citizen who purports to be victim of or to have witnessed crime is reliable informant even though his reliability has not theretofore been proved or tested.

3. **Automobiles and Other Motor Vehicles § 731*—driving under influence of intoxicants—warrantless search of home—exigent circumstances.**
Evidence was sufficient to establish exigent circumstances justifying officer's warrantless entry into defendant's home, where eyewitness at scene of accident informed officer that defendant was intoxicated, defendant had left scene of accident and where officer made prompt attempt to locate defendant in order to prevent him from returning to his, or another automobile, where he could have continued to drive in his condition.

ABRAHAMSON and HEFFERNAN, JJ., dissent.

REVIEW of a decision of the Court of Appeals. *Reversed.*

* See Callaghan's Wisconsin Digest, same topic and section number.

For the plaintiff-petitioner the cause was argued by *Stephen W. Kleinmaier*, assistant attorney general, with whom on the briefs was *Bronson C. La Follette*, attorney general.

For the defendant-appellant there was a brief and oral argument by *Archie E. Simonson* of Madison.

WILLIAM G. CALLOW, J. This is a review of a May 26, 1981, decision of the court of appeals vacating an order of Dane County Circuit Judge Mark A. Frankel and remanding the matter to the circuit court for further proceedings. We reverse the decision of the court of appeals and affirm the order of the circuit court. The trial court revoked the defendant's motor vehicle operator's license for sixty days pursuant to his unreasonable refusal to submit to a breathalyzer test, as required by sec. 343.305(2)(a), Stats. 1977,[1] after having been issued a citation for the operation of a motor vehicle while under the influence of an intoxicant. Section 346.63(1), Stats. 1977.[2]

[1] Section 343.305(2)(a), Stats. 1977 provides that

"Revocation of license on refusal to submit to tests . . . (2)(a) If a law enforcement officer has probable cause to believe that a person has violated s. 346.63(1) or a local ordinance in conformity therewith, the officer may request the person, prior to arrest and issuance of a citation, to take a preliminary breath test for the purpose specified under sub. (1), using a device approved by the department for the purpose. A person may refuse to take a preliminary breath test without being subject to revocation under sub. (9) if he or she consents, after arrest, to take a test under par. (b). Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance." *Id.*

[2] Section 346.63(1), Stats. 1977, provides that "[n]o person may drive or operate a motor vehicle while under the influence of an intoxicant or a controlled substance."

The defendant challenges the officer's warrantless arrest in his residence as violating the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution.[3] The circuit court upheld this warrantless arrest concluding that probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant, coupled with the existence of exigent circumstances, justified the officers' entry into the defendant's residence. The defendant appealed from this circuit court order, and a single judge of the court of appeals reversed the trial court, holding that, although the officers' warrantless arrest was unreasonable, thereby violating the Fourth and Fourteenth Amendments, the absence of a finding regarding a consensual entry necessitated remanding the case on that issue. We affirm the findings of the circuit court, holding that the co-existence of probable cause and exigent circumstances in this case justifies the warrantless arrest and obviates any further discussion concerning the issue of consensual entry.

Prior to resolving the merits of this case, the state challenges the single-judge ruling of the court of appeals, contending that this should have been decided by a three-judge panel. Section 752.31(2), Stats. 1977, provides a

[3] The requirements contained in the Fourth Amendment of the Federal Constitution are binding against the states through the Fourteenth Amendment. Further, the provisions of the Fourth Amendment to the Federal Constitution are identical to those contained in Article I, sec. 11 of the Wisconsin Constitution. Both provide that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution Amendment IV; *see* Wisconsin Constitution, Article I, sec. 11.

categorization of cases subject to review by a single court of appeals judge, as opposed to a three-judge panel.[4] This dispute focuses on whether the defendant's unreasonable refusal to submit to a breathalyzer test pursuant to sec. 343.305(2)(a), Stats. 1977, falls within the purview of sec. 752.31(2)(c), Stats. 1977, authorizing a single-judge appeal in cases involving violations of traffic regulations. The state contends that the statutory penalty imposed for violation of a traffic regulation, as defined in sec. 345.20(1)(a), Stats. 1977, is a forfeiture. According to sec. 288.01, Stats. 1977, however, a forfeiture is defined as "any penalty, in money or goods" and the penalty pursuant to violating sec. 343.305, Stats. 1977 is a suspension of operating privileges. Consequently, the state argues that a suspension is not a forfeiture and therefore is not included within the parameters established in sec. 752.31(2), Stats. 1977. The defendant's timely notice of appeal conferring jurisdiction to the court of appeals vitiates the need to determine whether

[4] Section 752.31(1), (2), (3), Stats. 1977 provides:

"752.31 Disposition of cases. (1) Except as otherwise provided in this section, the court of appeals shall sit in panels of 3 judges to dispose of cases on their merits.

"(2) Appeals to the court of appeals in the following types of cases shall be heard as specified in sub. (3):

"(a) Cases under ch. 299.

"(b) Municipal ordinance violation cases.

"(c) Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a).

"(d) Cases under ch. 51.

"(e) Cases under ch. 48.

"(f) Misdemeanors.

"(3) A case specified under sub. (2) shall be heard by one court of appeals judge, except that any party on appeal may move in writing to the chief judge of the court of appeals that the case be heard by a 3-judge panel. The chief judge may grant or deny the request ex parte. Any appeal which is heard by a single court of appeals judge shall be heard in the county where the case or action originated if any party so requests."

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sec. 343.305(2)(a), Stats. 1977, is a traffic regulation. For if the court of appeals in its exercise of jurisdiction erroneously assigns this case to a single judge rather than to a panel, this alleged error, and we need not rule whether the court of appeals erred in this case, was waived when neither the state nor the defendant interposed a timely objection. Although resolving this issue is unnecessary in the present case, it is instructive to note that sec. 752.31(2)(c), Stats., 1979–1980, was recently amended to include license suspension "cases under sec. 343.305," thereby expressly incorporating these cases within the parameters of sec. 752.31(2)(c), authorizing a single judge appeal. See sec. 2, ch. 152, Laws of 1981 (effective March 31, 1982).

The factual sequence underlying this dispute can be summarized through the testimony of the sole witness, Randy Jablonic. On the evening of April 24, 1978, Jablonic, a University of Wisconsin rowing coach, was driving alone in his truck. It was raining. He noticed that the driver of the automobile ahead of him was experiencing difficulty in operating his vehicle. In addition to the automobile's erratic speed, it was moving from side to side, crossing into the opposing lane, barely missing a road sign, a median strip, and the oncoming traffic. The vehicle ultimately left the road entirely and drove into a field where it either became stuck or stalled.

Jablonic, concerned that the car might return to the road and fearful "[b]ecause I realized [he] would probably kill somebody" remained at the scene blocking the car to be certain that the car did not return to the highway. A motorist stopped and Jablonic requested her to alert the police. An officer arrived at the scene shortly thereafter.

Prior to the officer's arrival, however, the driver left the automobile in the field and approached Jablonic's truck. Jablonic testified that the driver asked him for a

ride home but Jablonic replied that they should wait for assistance in removing or repairing the car, rather than leaving it in the field. At this point the driver became alarmed and "broke into a very slurred conversation—'you wouldn't get your cops'—or something it was very insecure and not very controlled conversation." The driver then left Jablonic and headed back across the field abandoning the automobile and departing from the scene of the accident.

The police arrived "practically immediately upon, . . . his departure" and spoke with Jablonic who had remained at the scene. Jablonic responded to the officer's inquiry by describing his observations of the automobile and its driver. Jablonic told the officer that he believed that the driver "was very inebriated or very sick or not very much in possession of his faculties or ability to perform." When asked at trial what formed the basis of his opinion that the defendant was inebriated, he testified ". . . the erratic motion of the car, and then the staggering and slurred speech that [the driver] exhibited when he was trying to talk" constituted the basis upon which he formed his conclusion that the driver was intoxicated. He further described the driver's walk as unsteady and unsure. He stated that when he spoke with the driver at the roadside he had remained in his truck. Consequently, he declared that he had "no opportunity to smell the [driver's] breath." Jablonic further testified that he commonly "see[s] many inebriated people, unfortunately," demonstrating his familiarity with the symptons of intoxication. Although Jablonic stated that "he [the driver] was very inebriated or very sick or not very much in possession of his faculties or ability to perform," this statement, when considered within the context of the entire record, demonstrates the propriety of the trial judge's conclusion that Jablonic conveyed the definite impression that the driver was intoxicated. Jablonic's reference to

illness was merely a remote possibility which provided an alternative, more charitable explanation—illness—to account for his erratic driving, unsteady movements, and slurred speech. The record supports the trial judge's ruling that the officer had probable cause to believe that the driver was intoxicated.

At the scene of the accident the officer ran a license check to determine the vehicle owner's identity. Although the officer could not conclude that the owner of the abandoned automobile was necessarily its driver, he did correctly recall that he was involved in the arrest of the owner in an alcohol-related disturbance within two weeks prior to this accident. The officer's recollection was sufficiently pertinent to provide additional evidence to support the existence of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence which was located near the scene of the accident. Attempting to confirm his belief that the defendant had, in fact, been driving his abandoned vehicle while under the influence of an intoxicant, the officer, arriving at the defendant's residence, asked the defendant's stepdaughter if the defendant was at home. The officer testified that she replied, he had "just stumbled in . . . ." "He is upstairs, and motioned that way—towards the stairs, allowing us to pass." Proceeding up the staircase, the officer encountered the defendant's wife. He testified that she asked:

" 'What is going on,' . . . again, we explained there had been an accident, . . . And we would like to speak with him because *we thought he was probably under the influence of an intoxicant*. And she, at that point, also gave her consent for us to go up, because she said, 'Yes, he is in bed. He just got into bed. And something has to be done,' referring to the fact that she recognized me from the earlier—I assumed she recognized me from the

earlier case, and was, I think, saying that she was concerned about his alcoholic problem. And she indicated, 'Something has to be done,' and motioned us to the bedroom." (Emphasis added).

Affirming the trial court's dual finding of probable cause and exigent circumstances vitiates the need to remand this case to the circuit court on the issue of consensual entry, as was ordered by the court of appeals.

The issue in the present case addresses the delicate interrelationship between the individual's right to privacy and the governmental responsibility to enforce the law in a manner which serves the public interest. To prevail in this case, the state must prove the co-existence of probable cause[8] and exigent circumstances, justifying the officer's conduct at the defendant's residence. We hold that there was ample evidence supporting the trial court's ruling that the officer's entry was justified on the basis of both probable cause and exigent circum-

[8] The arrest in the present case is statutorily authorized in sec. 345.22, Stats. 1977. This statute only requires probable or reasonable cause to effectuate a warrantless arrest.

Section 345.22, Stats. 1977, provides:

"345.22 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."

The "reasonable grounds to believe" language in sec. 345.22 is synonomous with the constitutional standard of probable cause. *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977). Consequently, our reference to probable cause in the present case shall be interpreted as being used interchangeably with and meeting the statutory standard of "reasonable grounds to believe." Section 345.22, Stats. 1977.

Section 345.22 only requires probable cause in its authorization of a warrantless arrest for violation of a traffic regulation. The instant case, however, meets the statutory probable cause standard in addition to meeting the case law requirements of probable cause *coupled with exigent circumstances*.

stances. Entry to effect a warrantless arrest in a residence is subject to the limitations imposed by both the United States and the Wisconsin Constitutions. U.S. Const. amend. IV; Wis. Const. art. I, sec. 11. The individual's right to privacy in the home is a fundamental freedom protecting the individual from unreasonable governmental interference; however, this fundamental right is not absolute. It is subject to limited but well-established exceptions where the public interest requires that proper authorities may impinge upon the individual's right to privacy. In these instances of compelling public need, the government bears the burden of proving that the public interest supersedes the individual's right to privacy. Consequently, to insure the validity of a warrentless arrest, the state must prove probable cause, coupled with exigent circumstances. *E.g., Dunaway v. New York*, 442 U.S. 200 (1979); *Henry v. United States*, 361 U.S. 98, 102 (1959); *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (1971); *see Payton v. New York*, 445 U.S. 573, 575, 583–88 (1980) [citing *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978)].[6]

[6] Both *Payton* and *Laasch* are Fourth Amendment cases, providing fundamental support for our position in the present case. *Payton v. New York*, 445 U.S. 573 (1980); *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978). Although a cursory reading of *Payton* suggests that it is unconstitutional for police officers, having probable cause, to enter a private residence without a warrant, it is clearly distinguishable from the case at bar because, unlike the present case, *Payton* expressly disavows a finding of exigent circumstances. *Payton* states that,

"[a]lthough it is arguable that the warrantless entry to effect Payton's arrest might have been *justified by exigent circumstances*, none of the New York courts *relied on any such justification*. The [New York court] treated both Payton's and Riddick's cases as involving routine arrests in which *there was ample time to obtain a warrant*, and we will do the same. Accordingly, *we have no occasion to consider the sort of emergency or dangerous situation*,

This dual finding is subject to numerous and diverse interpretations. The common feature underlying all search and seizure interpretations, however, is the *reasonableness* of the government's intrusion when considered within the context of the totality of the circumstances. *See: State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981); *Bies v. State*, 76 Wis. 2d 457, 468, 251 N.W.2d 461 (1977). The United States Supreme Court has addressed the concepts suggestive of analysis in determining the reasonableness of the governmental interference with the individual's Fourth Amendment rights. "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50–51 (1979). Moreover " '[w]hether an inquiry is considered reasonable must depend upon the facts in each case and must turn on the application of what is essentially an indeterminate and flexible test.' " *Bies v. State*, 76 Wis. 2d at 466 [quoting

described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583 (footnote omitted) (emphasis added).

Likewise, the defendant's warrantless arrest in *Lasech* v. *State* occurred absent a showing of exigent circumstances. In *Lasech*, the issue before this Court was "whether, in the *absence of* any *exigent circumstances*, a police officer may enter a suspect's home without consent in order to make a warrantless arrest." 84 Wis. 2d at 593 (emphasis added). Admittedly of less significance than the absence of exigency, the arresting officers in *Lasech* were arguably afforded ample time to obtain a warrant, as there was a thirteen-day interval between the defendant's offense and her arrest. *Id.* at 585–89.

Consequently, the time lapse and the absence of exigent circumstances in both *Payton* and *Lasech* limit their applicability to the present case. In this case, we hold that the existence of exigent circumstances contributes to our justification of Welsh's arrest.

Browne v. State, 24 Wis. 2d 491, 507, 129 N.W.2d 175 (1964)]. Although the State must prove the existence of both probable cause and exigent circumstances, negating any implication of adherence to a mere balancing test, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis. Exigent circumstances and particularly probable cause, are not susceptible to stringently mechanical definitions. Frequently, case law has offered guidance through example rather than by definition. Consequently, the particularities and peculiarities of a given case are considered in the context of reasonableness. Accordingly, thorough analysis seeks to ascertain whether the case, in its entirety, while meeting the dual standards of probable cause and exigency, veritably accommodates this context of reasonableness.

I. *PROBABLE CAUSE*

The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense. The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Paszek*, 50 Wis. 2d at 624–25. In *State v. Paszek*, 50 Wis. 2d at 624–25, we described probable cause as follows:

"Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the

information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. Probable cause is defined in *Draper v. United States*, *supra*, p. 313, as:

"'"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132."'" *State v. Paszek*, 50 Wis. 2d at 624–25 (citations omitted).

To effectuate a warrantless, nonconsensual entry into the residence, in addition to exigent circumstances the officers had to have probable cause to believe that the defendant had committed the offense of driving while under the influence of an intoxicant at the time they entered the home.

[1]

Examination of the record demonstrates the existence of probable cause, satisfying the first requisite of the two-pronged test necessary to justify the officer's warrantless entry and arrest of the defendant. In this case, the officer had a substantial amount of reliable information, indicating to a reasonable police officer that the defendant had probably violated the statute prohibiting driving while under the influence of an intoxicant. *See* secs. 345.22; 346.63(1), Stats. 1977.

[2]

Arriving at the scene of the accident the officer was met by Jablonic, the sole witness to the driver's conduct.

There is nothing in the record which challenges the reliability of either his observations or his statements to the officer. Adhering to the standard for reliability established in *State v. Cheers*, we held

" ' "that a valid arrest without a warrant may be made solely by reason of information communicated by a reliable informant. . . . A *citizen who* purports to be a victim of or to have *witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested.* . . . The rationale underlying this principle is that such a person, as the observer of criminal activity, acts openly in aid of law enforcement when he reports the crime to the police." ' " 102 Wis. 2d at 395–96. (emphasis added) (emphasis in original omitted) [quoting *State v. Paszek*, 50 Wis. 2d at 631].

Consequently, Jablonic's information satisfies both prongs of the *Cheers* test for reliability.

In the *Cheers* case we discussed an additional " 'factor to be considered in determining whether probable cause exists,' " namely, that the defendant's "conduct and retreat or 'flight' from the police officers' show of authority immediately prior to the time of his arrest certainly constitutes evidence of consciousness of guilt." *State v. Cheers*, 102 Wis. 2d at 391. The defendant's statements, as well as his immediate retreat from the scene in fleeing to his home at the mention of police officers, clearly "constitutes evidence of consciousness of guilt" and is an additional factor buttressing our conclusion that the trial court properly found the existence of probable cause.

Jablonic told the officer at the scene of the accident that the officer had arrived "practically immediately upon [the driver's] departure." The officer's license check identified the owner of the vehicle. As we have noted, ownership does not necessarily indicate the driver's identity; however, the officer correctly recalled his involvement in the recent arrest of the owner in an al-

cohol-related dispute. Jablonic did not give a detailed description to the officer of the driver's physical features, but he did state that the driver was a man wearing wet clothing. This information, coupled with Jablonic's observations of the defendant's erratic driving patterns and his personal conduct, further supports the trial court's holding of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence and was told that the defendant "had just stumbled in." While the officer, prior to his arrival at the house, had probable cause to believe that the defendant was the driver of the abandoned automobile, the defendant's stepdaughter's statement provided additional evidence in support of the proposition that the defendant was the driver because she said he had stumbled in only moments before the officer had arrived.

The word "stumbled" buttressed the witness's belief that the defendant was intoxicated. The fact that the defendant had just returned home on this rainy night supports the officer's belief that the defendant was the driver of his just abandoned car. The officer believed that he had probable cause, declaring that he "thought [the driver] was probably under the influence of an intoxicant."

Although the defendant contends that the officer proceeded to the residence to determine whether he had sufficient evidence to establish probable cause to enter and arrest the defendant, we do not find this contention persuasive. The officer, acting upon Jablonic's observations, coupled with his own accurate recollection of his involvement in the arrest of the defendant in a recent alcohol-related disturbance, had probable cause when he proceeded to the residence. The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause.

Scrutiny of the record, in its entirety, indicates that the officer had probable cause before he entered the defendant's residence. Although the officer may not have been absolutely certain that the defendant was driving while under the influence of an intoxicant, absolute certainty is not the standard employed in determining the existence of probable cause.

The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause. The officer testified that,

". . . it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

The defendant argues that this statement demonstrates that the officer did not believe he had probable cause and was going to the defendant's bedroom solely to investigate. The officer's statement, when considered along with his declaration that the defendant "was probably under the influence of an intoxicant," demonstrates that the investigating statement is not being read by the defendant in the context of the entire record. The officer, correctly believing that he had probable cause, merely recognized that he was not absolutely positive that the defendant had been operating his automobile while under the influence of an intoxicant. The defendant could have been drinking after he returned to his home, thereby rendering the results of a blood alcohol test meaningless. Moreover, if the defendant had been ill, rather than intoxicated, the officer would have changed his original conclusion on which he had predicated the existence of probable cause. Consequently, the officer's statement merely acknowledged that he was not absolutely certain

that the defendant was driving while under the influence of an intoxicant, and prior to arresting the defendant, he was willing to reconsider his initial conclusion if necessary. A synthesis of these facts negates the possibility that the officer only had a mere suspicion that the defendant was driving while under the influence of an intoxicant in violation of sec. 346.63(1), Stats. 1977.

The foregoing evidence, when myopically parsed, may not individually support a finding of probable cause. When examined collectively, however, it unquestionably indicates "that quantum of evidence which would lead a reasonable police officer to believe that the defendant [driver] probably [violated the statute prohibiting driving while under the influence of an intoxicant]."[7] *State v. Cheers*, 102 Wis. 2d at 386; *see Henry v. United States*, *supra;* secs. 345.22 and 346.63(1), Stats. 1977. The evidence in this case clearly demonstrates that the trial court was correct in ruling that the state had met its burden.

In considering the governmental interest, it is appropriate to note that driving under the influence is a pervasive problem of substantial proportion. In Wisconsin in 1981, there was a 5 percent increase in drunken driving convictions from 1980.[8] Further, approximately 50 per-

[7] Consequently, *Welsh* meets the probable cause standard articulated in both the majority and dissenting opinions in *State v. Cheers*, 102 Wis. 2d 367, 386, 306 N.W.2d 676 (1981); *Id.* at 406, 408 (Abrahamson, J., dissenting).

[8] Wisconsin Department of Transportation figures show that in 1981 there were 32,506 convictions for drunken driving. Drunken driving statistics covering years prior to 1981 have been published in annual reports entitled, Anderson, *Wisconsin Accident Facts* (prepared by the Traffic Accident Data Section of the Division of Motor Vehicles, Department of Transportation [hereinafter *Wisconsin Accident Facts*]).

In Wisconsin in 1980, there were 30,409 convictions for drunken driving. *Wisconsin Accident Facts* 16-17 (1980).

cent of all drivers killed in Wisconsin were driving while legally intoxicated.[9] The increasing number of fatalities caused by drunken drivers has aroused state legislatures to adopt stricter penalties in the forms of substantial fines, imprisonment, and license suspensions to punish those who violate the laws prohibiting driving while under the influence of an intoxicant.[10]

[9] In 1980, 583 drivers were killed. Of these drivers, 470 were tested for blood alcohol content, and 269 were found to be legally intoxicated, having a minimum blood alcohol content of .10 percent. *Wisconsin Accident Facts* 1 (1981). Similarly in 1978, 576 drivers were killed; while 226 of the 448 tested were found to be legally intoxicated. *Wisconsin Accident Facts* 1 (1979).

[10] Sec. 967.055, Stats., created by Chapter 20, Laws of 1981, provides:

"Sec. 967.055 Dismissing or amending charges; operating a motor vehicle, intoxicant or controlled substance. (1) INTENT. The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, or a controlled substance or both.

"(2) DISMISSING OR AMENDING CHARGE. Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63(1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25 or s. 940.09 where the offense involved the use of a vehicle or an improper refusal under s. 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant or both."

See Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving*, 55 Wis. B. Bull. 9 (April, 1982); *e.g.*, sec. 346.63(1), Stats., repealed and recreated by Chapter 20, Laws of 1981; sec. 346.65(2), Stats., repealed and recreated by Chapter 20, Laws of 1981; *see also* Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving*, 55 Wis. B. Bull. 15, 17 (May, 1982).

II. *EXIGENT CIRCUMSTANCES*

[3]

In addition to the existence of probable cause, accompanying proof of exigent circumstances must be shown in order to justify this warrantless entry. Proof of exigency vitiates the need for a warrant under those circumstances when obtaining a warrant could frustrate the arrest. An analysis of the facts demonstrates that, in this case, exigent circumstances justified this officer's warrantless entry to effect the arrest of the defendant.

Frequently, proof that the officer is in hot pursuit of the suspect constitutes exigency. The hot pursuit doctrine evolved to encompass situations where time was of the essence. In other words, when requiring the police to obtain a warrant would constitute undue delay, the hot pursuit doctrine is applicable. In this case, time was of the essence. The inherent nature of the offense demanded the suspect's immediate apprehension to accommodate the dictates of the blood alcohol test statute. Section 343.305(2)(a), Stats. 1977. In order for the officer to enforce the statutory requisites, the situation demanded his immediate search for and pursuit of the suspect.

The defendant, fearful of the officer's impending arrival and perhaps recognizing the possibility of being requested to submit to a blood alcohol test, left the scene of the accident upon discovering that the officer had been summoned. Fleeing to his home, in an attempt to avoid a confrontation with the officer, the defendant's hasty departure resulted in the abandonment of his car. If the officer had retreated and sought to obtain a warrant, rather than immediately pursuing and arresting the suspect, the requirements of the blood alcohol statutes would have been frustrated.

The imminent threat to safety doctrine also constitutes exigent circumstances. The sole purpose of the blood al-

cohol test is to facilitate prosecution of those driving while under the influence of an intoxicant. *See* sec. 343.-305(2)(a) and 346.63(1), Stats. 1977. Further, sec. 345.24, Stats. 1977, provides that a person arrested for driving while under the influence of an intoxicant "may not be released until four hours have elapsed."[1] This severe treatment is dramatic evidence of the legislature's intent and recognition of the need to protect the public from drunken drivers. Undoubtedly, this provision was enacted to prevent drunken drivers from returning to the road while intoxicated. Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level, equal to or less than .05 percent. Restraining those drivers who pose a danger to themselves and the public for the four-hour statutory period constitutes a preventive measure, designed to promote public safety.

The officer concluded that he had probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant. Accordingly, the situation demanded the officer's prompt attempt to locate the defendant. An arrest would prevent the driver from returning to his, or another automobile, where he could have continued to drive in his current state, posing a danger to himself and the public. Consequently, the nature of this offense, coupled with the po-

[1] Section 345.24, Stats. 1977, provides in its entirety:

"345.24 Officer's action after arrest for driving under influence of intoxicant. A person arrested under s. 346.63 or an ordinance in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be released until 4 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305(2)(b) shows that there is .05% or less by weight of alcohol in the person's blood, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest."

tential threat to the public safety, satisfied the exigent circumstances test pursuant to the imminent threat to safety doctrine.

An equally persuasive argument is the probable destruction of evidence. This is a model case demonstrating the urgency involved in arresting the suspect in order to preserve evidence of the statutory violation. "Sometimes the nature of the evidence will be such that it will soon disappear of its own accord." 2 W. LaFave, *Search and Seizure*, sec. 6.5 at 448 (1978). "Blood rapidly metabolizes alcohol after a person ceases drinking; thus creating an exigent situation." *State v. Bentley*, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979). Without an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of the defendant's alleged violation of sec. 346.63(1), Stats. 1977, would be destroyed. *See* sec. 343.305(2)(a), Stats. 1977. Accordingly, the facts of this case adhere to the presumption favoring warrantless arrests which are a result "of an ongoing investigation in the field," rather than an arrest that had been planned. W. LaFave, *supra*, sec. 6.1 at 391.[13]

[13] Professor LaFave, a preeminent authority on the Fourth Amendment, distinguished a finding of exigency in cases involving planned arrests as opposed to those relating to an ongoing investigation in the field:

"A 'planned' arrest is one which is made after a criminal investigation has been fully completed at another location and the police make a deliberate decision to go to a certain place, either the arrestee's home or some other premises where he is believed to be, in order to take him into custody. . . . Courts have understandably been reluctant to accept police claims of exigent circumstances in these situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained." W. LaFave, *supra*, sec. 6.1 at 391.

"On the other hand, when the occasion for arrest arises while the police are already out in the field investigating the prior or

In summary, we conclude that this situation did not afford the officer ample time in which to obtain a warrant. Further, the record demonstrates that the officer's conduct was reasonable within the context of the surrounding circumstances. Accordingly, we affirm the circuit court's holding, finding the existence of both probable cause and exigent circumstances in the present case.

By the Court.—The decision of the court of appeals is reversed.

CECI, J., took no part.

SHIRLEY S. ABRAHAMSON, J. (*dissenting*). As a result of the decision in this case, if a witness reports to the police that:

(1) a few moments ago, on this dark, rainy night he saw a car being driven erratically into a field;

(2) he observed and spoke with the driver of the car but does not know the name of the driver;

(3) the driver staggered and had slurred speech but that the witness had no opportunity to smell any alcohol on the driver's breath;

(4) the driver was either very inebriated or very sick; and

(5) there was no damage to any person or any property;

then the police officers, relying on a statute allowing an officer to arrest a person without a warrant for violating a civil traffic regulation (a civil, not a criminal offense)

ongoing conduct which is the basis for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant. Here, *the presumption should be in favor of a warrantless arrest rather than against it*, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it." *Id.* at 392 (emphasis added) (footnote omitted).

committed outside his presence, after checking to find that the title to the car is in your name, may, without your consent and without having a search warrant or arrest warrant issued by a judicial officer:

(1) go to your home at night;

(2) enter your home;

(3) climb the stairs to your second-floor bedroom;

(4) look around your bedroom to see if the clothes you took off match the description of the clothes worn by the driver of the car; and

(5) ask you, as you lie naked in your bed, to get out of bed so that the officers can determine whether you are intoxicated.

I dissent because I conclude that this warrantless invasion into your privacy in your home to investigate whether you violated a civil traffic statute contravenes sec. 11, Art. I, of the Wisconsin constitution and the fourth amendment to the federal constitution which guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ."

The essence of the fourth amendment is that a judicial officer with the power to issue a warrant, not a policeman or government agent, decides whether the government can enter your home without your consent. As Justice Jackson so eloquently stated:

"Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

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In a free society a warrant provides fourth amendment protection (1) by substituting the judgment of a judicial officer for that of the police officer; (2) by preventing hindsight from coloring the determination of probable cause; and (3) by providing the person subject to the arrest with assurance that the police officer is acting within lawful authority. *United States v. Martinez-Fuerte*, 428 U.S. 543, 565–66 (1976). Under our constitution a warrantless arrest is unreasonable except in a few "jealously and carefully drawn" exceptional circumstances. *Jones v. United States*, 357 U.S. 493, 499 (1958).

In our country a warrantless entry into a home by a police officer is presumed unreasonable, because our society recognizes the special sanctity of the home. In *Payton v. New York*, 445 U.S. 573, 585–86 (1980), the United States Supreme Court clearly proclaimed that the "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,'" and that "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." It is only when "exigencies of the situation . . . make warrantless entry *imperative*" that warrantless entry into a person's home may be condoned. *Laasch v. State*, 84 Wis. 2d 587, 594, 267 N.W.2d 278 (1978). (Emphasis added.)

I dissent because I conclude that the warrantless intrusion into the defendant's home in the instant case is unconstitutional. First, I have grave doubts as to the constitutionality of sec. 345.22, Stats. 1977, authorizing a warrantless arrest for violation of a civil traffic offense committed outside the officer's presence. Absent sec. 345.22 the officer has no statutory or common law authority to arrest the defendant without a warrant. Second, assuming arguendo that a police officer has authority to arrest the defendant without a warrant for vio-

lation of a civil traffic offense committed outside the officer's presence if the officer had reasonable grounds to believe that the person violated a traffic regulation, the facts in this record do not support the majority's conclusion that the officer had probable cause to believe that the defendant committed the civil offense of operating a motor vehicle while intoxicated. Third, the facts do not justify the legal conclusion that the circumstances were exigent, making the warrantless entry into the defendant's home "imperative." *Laasch v. State, supra*, 84 Wis. 2d at 594.

Arrest for a Civil Offense. In contrast to the cases cited and relied upon by the majority to justify a warrantless entry into the defendant's home, this case does not involve a warrantless arrest for a felony. This case does not involve a warrantless arrest for a misdemeanor. This case does not even involve a warrantless arrest for the violation of a civil traffic statute committed in the presence of an officer. This case involves a warrantless arrest for the violation of a civil traffic statute committed outside the presence of an officer.

The majority states that the officer's power to arrest is predicated on sec. 345.22, Stats. 1977, which states:

"345.22 **Authority to arrest without a warrant.** A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."[1]

[1] Both the defendant and the state initially treated this case as if the defendant was accused of violating a criminal statute and not a civil statute. The court of appeals decision stated that the case involved a misdemeanor yet there is no proof in the record that the defendant was involved in a crime. A first violation of sec. 346.63(1) is a civil forfeiture; a second or subsequent violation of within the statutory time period is a crime. Sec. 346.65(2)(a)1, 2. The state in its briefs referred to the officer's power to arrest under sec. 968.07(1)(d), Stats. 1979–80, the criminal arrest statute.

Sec. 345.22 is a departure from the common law doctrine of arrest and for the long-standing rules of arrest in Wisconsin. The statute was enacted in 1971. The long-standing Wisconsin rules of arrest allowed an officer to make a warrantless arrest if the officer had probable cause to believe the person had committed a felony or to believe the person committed a misdemeanor in the officer's preesnce. The officer could not make a warrantless arrest if the misdemeanor was not committed in the officer's presence. The common law, in contrast to the Wisconsin law, was more restrictive as to the officer's power to make a warrantless arrest for a misdemeanor. At common law the arrest was permissible only if the misdemeanor was committed in the presence of the officer and constituted a breach of the peace. *State v. Smith*, 50 Wis. 2d 460, 469, 472, 184 N.W.2d 889 (1971).

The validity of sec. 345.22, which authorizes a warrantless arrest for violation of a civil statute when the violation was committed outside the presence of the officer cannot be assumed. The constitutionality of a warrantless arrest for a *felony* committed outside the presence of an officer was not settled until 1976, and then by a divided United States Supreme Court. In *United States v. Watson*, 423 U.S. 411 (1976), the Court declared constitutional a daytime warrantless arrest in a public place for a felony committed outside the presence of the officer. The Court upheld the warrantless felony arrest in that case, reasoning that such an arrest is based on accepted common law doctrine of arrest and that if fel-

When the defendant made the point that the offense here is civil, the state agreed that there is no indication that the offense is criminal. The state in its final brief argues that because the defendant did not raise the question of whether the offense here indeed was a crime, that issue has been waived. I conclude that, regardless of the issue of waiver, the validity of sec. 345.22 is an important issue for this case and law enforcement, and we should under our discretionary powers reach it.

ony arrests were permissible only with a warrant or only in exigent circumstances effective criminal law enforcement would be significantly handicapped. The reasoning of the *Watson* case cannot be applied to uphold sec. 345.22. I cannot find that the common law allowed a warrantless arrest for the violation of a civil offense committed outside the presence of an officer. The police apparently have the authority to issue a traffic citation to a person who violated a traffic law ordering the person to present himself at court at a certain time. If we conclude that the police officer must get a warrant to arrest such a person, the effective enforcement of the traffic law will not be significantly handicapped and the constitutional protection of the sanctity of the home will be enhanced.

I have found no cases, and the majority cites none, upholding a warrantless arrest, either in a public place or in a home, for a civil traffic offense committed outside the presence of the officer. All the cases and commentary cited by the majority address the question of the validity of an arrest for a violation of a criminal statute. In *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967), the Court concluded that in the absence of compelling urgency a warrantless administrative public health search of a home violates the fourteenth amendment. Neither the defendant nor the state discusses the question of the validity of sec. 345.22. Because the validity of sec. 345.22 is of significance to traffic law enforcement in general, I would ask the parties for further briefing on this question.

At this stage, however, I wish to express my doubts about the constitutionality of sec. 345.22, Stats. 1977, to the extent that it authorizes a warrantless arrest on probable cause for a civil traffic offense committed outside the presence of an officer. Requiring a warrant in

civil traffic cases would protect the privacy of the individual guaranteed by the constitution and would not unduly burden law enforcement. If there are exceptions to the warrant requirement in civil traffic cases, these have to be defined.

Assuming arguendo that the law applicable to warrantless felony arrests can be applied without change to warrantless arrests for civil traffic offenses committed outside the presence of a police officer, I conclude there was no probable cause or exigent circumstances.

Probable Cause. In reviewing the decision of the circuit court as to probable cause, this court will not overturn findings of fact unless against the great weight and clear preponderance of the evidence, but this court will independently examine the record to make its own determination of the legal question, namely, whether the constitutional requirement of probable cause is satisfied.

The circuit court in this case stated its decision from the bench. The circuit court merely concluded that "the police did have probable cause to believe that the defendant had committed the offense of operating while under the influence." The circuit court did not make any findings of fact, did not make any analysis or summary of the facts, and did not analyze the legal principles it used to reach its legal conclusion.

There are disputed facts in this case and the credibility of witnesses is at issue. Generally where the circuit court does not expressly make a finding necessary to support its legal conclusion, this court can assume that the circuit court made the finding in the way that supports its decision. *Sohns v. Jensen*, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). See also *State v. Fillyaw*, 104 Wis. 2d 700, 727-28, 312 N.W.2d 795 (1981) (Abrahamson, J., concurring). The majority's de novo review of the record must therefore be to determine the legal signifi-

cance of the facts, not to decide the disputed facts and the credibility of witnesses.

When an arrest is made without a warrant the state bears the burden of proving the existence of probable cause. *Leroux v. State*, 58 Wis. 2d 671, 682, 207 N.W.2d 589 (1973). In the case at bar a determination by this court of the legal question of probable cause to believe that the defendant was driving while under the influence of an intoxicant turns on three pieces of information known to the officer making the arrest.

The first piece of information is the ownership of the car. This information is relied upon to establish that it is probable that the defendant was the driver of the car. Jablonic did not describe the driver sufficiently for the officer to be able to identify the defendant as the driver. The officer had to reason that because the defendant was the owner of the car, he was probably the driver.

The second piece of information on which the determination of probable cause turns is that the defendant had been arrested previously in an alcohol-related disturbance. This information is relied upon to establish that the defendant was probably intoxicated. There is no indication in the record as to the nature of the alcohol-related disturbance; as to whom, if anyone, was intoxicated during this alcohol-related disturbance; as to the nature of the offense for which the defendant was previously arrested; whether there was any finding of probable cause for the arrest; or whether any further civil or criminal proceedings against the defendant resulted from the arrest. The majority opinion says that the officer "did *correctly* recall" the arrest. (Emphasis added.) *Supra*, p. 325. See also *supra*, pp. 331, 332 where the majority states that the officer's recollection was accurate and correct. There is nothing in the record which indicates whether the officer's recollec-

tion about the previous arrest of the defendant is correct or incorrect.

I need not reach the question of when a defendant's previous arrest may be relevant and probative in determining probable cause. In the case at bar the officer's testimony as to the defendant's prior arrest is so sketchy and subject to so many interpretations that neither the circuit court nor this court can use the information about the arrest to help form its independent determination whether the facts in the possession of the officer are as a matter of law sufficient to constitute probable cause.

The third, and most important, and perhaps the only piece of information on which the determination of probable cause turns, is Jablonic's statement to the officer. This information is relied upon to establish that the driver was probably intoxicated. The critical element in determining probable cause in the case at bar is whether the information which Jablonic, a reliable eyewitness, gave the police officer is sufficient to lead a reasonable police officer to believe that the driver was probably driving under the influence of an intoxicant.

Jablonic, the only person available with first-hand information about the driver and his driving, testified that the driver was walking and speaking with difficulty and that he was either intoxicated or sick. Even though, as he testified, he was familiar with the signs of intoxication, Jablonic had good reason to be uncertain. The weather was bad, and visibility was poor. Further, Jablonic was not able to verify or discard his intoxication theory because he did not have the opportunity to smell any alcohol when the driver spoke to him and asked him for a ride. I acknowledge that the mere fact that an innocent explanation for the driver's conduct, that is, illness, may be imagined is not enough to defeat probable cause. 1 LaFave, *Search and Seizure*, sec. 3.2(e), pp. 483–84 (1978). But in this case the innocent explana-

tion for the driver's conduct is not imagined; the innocent explanation is provided by the only witness, and it is provided as a real possibility.[3] The majority, without explanation and without any basis in the record, characterizes Jablonic's reference to illness as "merely a remote possibility which provided an alternative, more charitable explanation." *Supra*, p. 325.

The officer's testimony of what Jablonic told him is inconsistent with Jablonic's testimony. The officer testified that Jablonic had a definite opinion that the driver

[3] Jablonic's entire testimony as to what he told the police officer concerning the driver's condition is as follows:

"*Q.* What did you tell the officer? Did you give the officer a description of the individual you had been talking to?

"*A.* I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to perform. And it was my feeling that he had taken off across the field.

"*Q.* What did you base your opinion on that he was inebriated?

"*A.* Well, first of all the erratic motion of the car, and then the staggering and slurred speech that he exhibited when he was trying to talk to me.

"*Q.* You have seen people or persons under the influence of an intoxicant before?

"*A.* Working at the University, it's a common—very common to see many inebriated people, unfortunately."

Jablonic described the driver as follows:

"*Q.* Did you notice anything about this person?

"*A.* They had a kind of a wet leather jacket on or something that looked like a reddish-brown jacket, as what I can recall. It was evening. It was raining and wet. It might have been even a sportcoat that was just wet. And they stood by the window of the car, which I rolled down.

"*Q.* All right, did you have an opportunity to observe the way this person walked?

"*A.* It was very unsteady and unsure. And—the person that just wasn't very well would walk like that.

"*Q.* And did you—did this person get close enough to you that you could observe his breath?

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was intoxicated.[3] Other aspects of the officer's testimony, however, indicate that Jablonic had conveyed his uncertainty to the officer as to whether or not the driver was intoxicated. The officer's own testimony indicates that he went to the defendant's residence to investigate the defendant's condition, not to arrest the defendant. Thus in response to the question as to what was the officer's "mental intent, when you went into the house, to have him arrested for drunken driving," the officer answered,

"Well, it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

It was only after making the warrantless entry into the home, observing the defendant "wringing wet," seeing in the bedroom defendant's clothes which matched the clothes Jablonic described and smelling alcohol that the officer himself concluded he had sufficient information to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant and decided to arrest the defendant.

Although the majority states that the circuit court reached "the conclusion that Jablonic conveyed the definite impression that the driver was intoxicated" (*supra*,

"*A*. No. They remained outside the vehicle. I did roll down the window. I conversed with the person. But there was no opportunity to smell his breath."

[3] Officer Daley testified as to his conversation with Jablonic as follows:

"Q. Do you recall whether or not he [Jablonic] said anything about this individual being under the influence?

"*A*. Yes, he had a definite opinion about that.

"Q. What did he tell you?

"*A*. He said the man was very obviously intoxicated."

p. 324), nowhere in the record did the circuit court state such a conclusion or even hint it reached such a conclusion. The circuit court's only reference to Jablonic's testimony is a reference by the circuit court to its notes which quote Jablonic as telling the officer that the driver was either sick or intoxicated. If any conclusion of the circuit court might be gleaned from the record as to the circuit court's finding of credibility as to Jablonic's or the officer's version of what Jablonic told the officer, and I do not know that any can be, it is that the circuit court relying on its notes concluded that Jablonic offered two explanations to the police officer for the driver's conduct—intoxication and illness. The most appropriate construction of the record is, however, that the circuit court concluded that it need not decide which witness to believe because whichever witness it believed the evidence was adequate to establish probable cause.

The majority seeks to bolster its conclusion that the officer had probable cause by relying on the officer's testimony as to what the daughter and the wife said when the officer entered the house. The daughter was not present to testify. The wife, without objection, related the daughter's version of what had happened, and the wife's testimony contradicts the officer's. The circuit court expressly avoided having to determine whose testimony it believed, the wife's or the officer's, and therefore the majority cannot use the officer's disputed testimony to bolster its conclusion.

Although the subjective conclusions of the police officer concerning the existence of or lack of existence of probable cause do not bind a court, the officer's apparent decision in the case at bar that the eye-witness furnished information sufficient to warrant further investigation but did not furnish information sufficient to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant has some weight in this court's independent determination

of whether the information relayed to the officer was sufficient. Instead of saying that he intended to arrest the defendant but that he would have refrained from making the arrest if he found that the defendant was not intoxicated, the officer concluded on the record that it was his "intent to investigate . . . and make a determination." The majority cannot, try as it will, change the officer's words.

On the basis of the record in this case, I conclude that the state did not present sufficient facts to prove that information in the officer's possession was sufficient to satisfy the constitutional standard of probable cause. I conclude that when the officers entered the residence, they could only suspect that the defendant may have been the driver and that the driver may have been under the influence of an intoxicant. Reasonable suspicion (that is, ample factual justification falling short of what is required to support arrest or search) may be sufficient to justify further investigation, and in some situations, to justify a stop but it is not sufficient to justify a warrantless arrest. *Brown v. Texas*, 443 US 47, 51 (1979); *Terry v. Ohio*, 392 US 1, 22 (1968); *Wong Sun v. United States*, 371 US 471, 479 (1963); *State v. Cheers*, 102 Wis. 2d 367, 386–87, 306 N.W.2d 676 (1981); *Bies v. State*, 76 Wis. 2d 457, 465–66, 251 N.W.2d 461 (1977).

The majority opinion, in the section entitled probable cause, discusses the government's interest in eradicating drunk driving. *Supra*, pp. 333–335. The relevance of this discussion is not readily apparent. First, granting the police the power that the majority does in this case "does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment." *Delaware v. Prouse*, 440 U.S. 648, 660 (1979). The contribution to highway safety of allowing warrantless arrests in the home of persons who are reported to have driven erratically and who are described as drunk

or sick and who caused no damage to property or person is marginal at best.

Second, if the police officer had probable cause to make the arrest, the government's interest and the seriousness of the offense are irrelevant. If the police officer did not have probable cause to arrest, the arrest is unconstitutional and the government's interest and the relative seriousness of the offense are irrelevant. If the majority's discussion of the government's interest is the majority's way of saying that the seriousness of the offense is a factor for the police and the courts to consider in determining probable cause, the majority is making a dramatic change in the law of probable cause and is establishing a balancing, sliding scale test that would be difficult for both police and courts to comprehend and apply. 1 LaFave, *Search and Seizure*, sec. 3.2(a), pp. 450–58 (1978).[4]

[4] In determining probable cause there is no balance or weighing of the gravity of the public concerns served by the arrest and the severity of the interference with individual liberty. The balance has been made by adopting the requirement of probable cause. As the United States Supreme Court has said, "The requisite 'balance' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

The majority at one and the same time appears to negate and to inject a balancing test in determining probable cause. The majority says at *supra*, p. 327 that "although the State must prove the existence of both probable cause and exigent circumstances, *negating any implication of adherence to a mere balancing test*, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis." (Emphasis supplied.) The progeny to which the majority refers are *Brown v. Texas*, 443 U.S. 47, 50–51 (1979), and *Bies v. State*, 76 Wis. 2d 457, 466, 251 N.W.2d 461 (1976) (quoting *Browne v. State*, 24 Wis. 2d 491, 507, 129 N.W.2d 175 [1964] cert. denied, 379 U.S. 1004). These cases involve an investigation or a stop which requires something less than probable cause. An investigation and a stop may be justified even if there

Exigent circumstances. Even if there is probable cause to believe the defendant has committed a *felony*, a warrant is required to enter a home unless exceptional circumstances are present which justify a warrantless entry. *United States v. Johnson*, — U.S. — (June 21, 1982); *Payton v. New York*, 445 U.S. 573 (1980); *Laasch v. State*, 84 Wis.2d 587, 267 N.W.2d 278 (1978). *Payton* and *Laasch*, upon which the majority relies, are authority only for the proposition that a warrantless arrest in a home may be permissible under exigent circumstances if the officer has probable cause to believe a *felony* has been committed. These cases are not authority for a rule that a warrantless arrest can be made in a home under exigent circumstances if the crime is a misdemeanor or if the offense is a civil traffic offense. The majority cannot assume that the *Payton* and *Laasch* rule is automatically applicable to this case. The issue which must be decided, not assumed, is under what circumstances, if any, is a warrantless entry in a home at night to effect an arrest for violation of a civil statute constitutional? Does the government's interest in enforcing the civil law and collecting a forfeiture ever

is no probable cause as long as there is "mere 'reasonable suspicion.'" *Dunaway v. New York*, 442 U.S. 200, 211 (1979). Reasonableness in the probable cause context revolves around whether the officer has *reasonable* grounds to believe that the defendant probably committed a crime. Reasonableness in the context of an investigation or stop involves balancing the gravity of the state's interest and the nature of the invasion of the privacy of the person. The majority's shifting back and forth between the balancing test justifying an investigation or stop and the concept of probable cause justifying a search or an arrest may very well explain why the majority reaches the conclusion it did in this case that the intrusion in the defendant's home and his arrest were constitutional.

The court of appeals used a balancing test in this case to determine exigency, not in the issue of probable cause. See note 5 *infra*.

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outweigh an individual's expectation of privacy in his or her home?

Even if I were to assume that the *Payton-Laasch* rule is automatically applicable to this civil forfeiture case, I conclude the record is not adequate to find exigent circumstances.

The exigent circumstances doctrine, like all exceptions to the warrant requirement, must be viewed as a narrow exception to the protections of the fourth amendment. In *McDonald v. United States*, 335 U.S. 451, 456 (1948), the Court said: "We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that cause *imperative*." (Emphasis added.) See also *Laasch v. State*, quoted *supra* at page 3 of this dissent.

Although the United States Supreme Court has on several occasions spoken of exigent circumstances, the Court has not clearly defined what are exigent circumstances or established standards to measure the existence of such exigent circumstances. In this case, the circuit court appeared to conclude that the exigency arose out of hot pursuit and the need to preserve evidence of intoxication. The majority, on the other hand, identifies three exigent circumstances, that is, three urgent circumstances that make resort to the warrant process impracticable: (1) the need to prevent the offender's escape (hot pursuit); (2) the need to prevent physical harm to the offender and the public; and (3) the need to prevent the destruction of evidence.

The majority opinion does not establish standards by which the existence of the exigent circumstances are to be tested. For example, the majority does not explain whether the test for a valid warrantless entry under the exigent circumstances doctrine is a subjective one, an objective one, or both. In *State v. Prober*, 98 Wis. 2d

345, 365, 297 N.W.2d 1 (1980), the court adopted a two-step analysis (subjective and objective) for application of the emergency doctrine, an exception to the warrant requirement which is similar to the exigent circumstances doctrine. Under *Prober*, the warrantless search is invalid unless the officer is actually motivated by the perceived emergency, that is, to render aid or assistance (subjective test). Second, "even though the requisite motivation is found to exist," the warrantless search is invalid unless a "reasonable person under the circumstances would have thought an emergency existed" (objective test).

If the *Prober* two-step analysis for the emergency doctrine is not applicable to the exigent circumstances doctrine the majority ought to tell us why.

This case cannot meet the *Prober* subjective test. The officer did not testify that he believed he had to arrest the defendant immediately in order to prevent the defendant from escaping or in order to protect the defendant or the public from the danger of the defendant driving another automobile that night. The officer does refer to the fact that alcohol dissipates with the passage of time. But the officer said that his subjective motivation was to investigate immediately, to determine if the defendant was drunk. The officer did not testify that he believed he had to arrest the defendant immediately to preserve the evidence. He said he went into the house to determine whether the defendant was drunk and if so he would then attempt to preserve the evidence.

This case also cannot meet the *Prober* objective test of exigent circumstances.[6] The essence of the exigent cir-

[6] In applying the objective standard, federal and state courts have, according to the commentators, taken one of two approaches in attempting to articulate the facts which bear on the determination of exigent circumstances: the checklist approach articulated in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en

cumstances doctrine is the degree of urgency to make the arrest or search created by the exigency and the amount of time it would take to obtain a warrant.

The warrantless entry in this case cannot be justified as necessary to prevent the defendant from escaping arrest or to prevent physical harm to the driver or to the public. The police had the defendant's name and address. There is nothing in the record to indicate that the police thought he would leave the jurisdiction or would not be available for arrest unless he was pursued and arrested immediately. The majority speculates, without anything in the record supporting this speculation, that the defendant (whose car was in the field and who, as the police officers found out when they knocked on the door, was in

banc) or the totality of the circumstances test. See Harbaugh and Faust, *"Knock on Any Door"—Home Arrests after Payton and Steagald*, 86 Dick. L. Rev. 191, 224–25 (1982); Donnino and Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90 (1980); 2 LaFave, *Search and Seizure*, sec. 6.1, pp. 388–95 (1978).

Judge Gartzke, writing for the court of appeals, used a balancing test to determine whether the exigency justified the intrusion. He assumed that this case involved a misdemeanor and concluded that although there was urgency to avoid destruction of evidence, the urgency in this case was not sufficiently great to justify a warrantless arrest in the home. He noted that the "misdemeanor" in this case was not a grave offense. The defendant had not injured any person or property. The defendant's wife and daughter were in no danger. The defendant was in no danger; he was upstairs in bed. An intrusion by the police into a bedroom at night is a serious intrusion on privacy. Entry into the home is ordinarily afforded the most stringent fourth amendment protection. Judge Gartzke's approach of looking at the entire case and balancing the government's need for immediate police action and the defendant's interest in privacy in the home is interesting and worthy of discussion and consideration. It also seems to fit into the majority's keen interest in balancing and reasonableness. Unfortunately the majority ignores the approach of the court of appeals.

bed) had to be arrested immediately to prevent him from driving another car. The "threat to safety" exception must be limited to situations where the officer has reasonable factual justification to believe the defendant intends to drive again. Without this limitation, in every case involving probable cause to believe that the person was driving under the influence, the police would be justified in making a warrantless entry into the home to arrest the person.

The threatened destruction or removal of evidence presents a more difficult issue of exigent circumstances. It is beyond question that alcohol "disappears" over a period of time and that the evidence of intoxication will be destroyed by the passage of time. But neither the record nor the majority opinion describes the degree of urgency to make the arrest, that is, how long a time period may elapse before the alcohol has disappeared, and the amount of time it would take to obtain a warrant in the city of Madison at 9:30 at night.

Drugs can be flushed down a toilet in seconds. Money or bloody clothes can be burned within minutes. When we talk about "destruction" of the evidence of intoxication we are talking about hours.

Sec. 345.24, Stats. 1977, indicates that it may take up to four hours to allow an intoxicant's blood alcohol content to metabolize to a "safe" level. Sec. 885.235(3), Stats. 1977, states that chemical tests performed within two hours of the event to be proved are given prima facie effect without expert testimony; tests performed more than two hours after the event to be proved are admissible as evidence if expert testimony establishes its probative value and prima facie effect. Thus police can perform the test more than two hours after the event and still have acceptable evidence to present in court. In *State v. Bentley*, 92 Wis.2d 860, 286 N.W.2d 153 (Ct. App. 1979), a blood sample was taken from the accused

three and a half hours after the accident, and the results were apparently damaging to the accused's position. Sec. 885.235(3) was amended in 1982 to provide that samples taken within *three* hours are given prima facie effect without expert testimony; tests not taken within three hours after the event are admissible only if expert testimony establishes their probative value and prima facie effect. See ch. 20, sec. 1816(c) and (e), ch. 184, sec. 5, Laws of 1981.

In this case the police zeroed in on the identity of the defendant in about one half hour after the event to be proved. It is up to the state to introduce evidence that resort to the warrant process was impracticable because the warrant and any test for intoxication would come too late. Yet the state introduced no such evidence. Nor are there scientific facts or facts relating to the practice in Dane County as to the issuance of warrants of which this court might take judicial notice to justify the conclusion that a reasonable officer might reasonably have believed that he had to preserve the evidence from destruction and had no time to get a warrant. Because the state has not met its burden of showing that its warrantless entry was "imperative," I would hold that the circumstances were not exigent.

Accordingly, I would affirm the decision of the court of appeals and remand this case to the circuit court to determine the issue of consent.

To preserve the federal and state constitutional guarantees of the sanctity of the home against the knock on the door in the middle of the night by government officers who do not have a warrant issued by a judicial officer, I dissent.

I am authorized to state that Justice NATHAN S. HEFFERNAN joins this dissent.

-5466

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
Case No._____

RECEIVED
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SUPREME COURT, U.S.

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner, by his undersigned attorney, hereby moves to be permitted to file a petition for writ of certioari in this court in forma pauperis, pursuant to Rule 46, Rules of the Supreme Court of the United States, on the basis of the attached affidavit.

On this day petitioner also executed an affidavit of indigency for the Wisconsin State Public Defender who is assisting petitioner in this action. The Wisconsin affidavit is also attached herewith.

Dated this 23d day of September, 1982.

Respectfully submitted,

Gordon Brewster Baldwin

GORDON BREWSTER BALDWIN
Attorney for Petitioner.

P.O. Adress:

University of Wisconsin
Law School
Madison, WI 53706

(608) 263-2077

RECEIVED
SEP 27 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

EDWARD G. WELSH,

Petitioner,

v. No.

STATE OF WISCONSIN,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED ON APPEAL IN FORMA PAUPERIS

I, Edward G. Welsh, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

Whether the Fourth and Fourteenth Amendments permit police to enter my home without a warrant, and without establishing consent to enter, in order to make an arrest for a non-jailable offense.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

(1) Are you presently employed? No

(a) If the answer is yes, state the amount of salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

March - 1969
$700.00 a Mo.

(2) Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

(a) If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

No (3) Do you own any cash or checking or savings account?

(a) If the answer is yes, state the total value of the items owned.

(4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

(a) If the answer is yes, describe the property and state its approximate value.

1974 - Buick appro. $800.00

(5) List the persons who are dependent upon you for support and state your relationship to those persons.

Pat Welch - Husband
Mike Welch - Father

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Edward G. Welsh
EDWARD G. WELSH

Subscribed and sworn to
before me this 23rd day
of September, 1982.

John S. Grabowski
Notary Public
State Of Wisconsin
My Commission is Permanent.

Plaintiff,

v.

AFFIDAVIT OF INDIGENCY

Edward G. Welsh
7158 Tree Lane
Madison, WI 53717
608-633-6172

Defendant.

The undersigned defendant first duly sworn on oath deposes and says:

1. That s/he is (not employed) (employed with a take home pay of $ 0 / monthly.) Number of dependents including yourself 3.
2. That s/he receives monthly welfare, (disability,) pension or (social security) payment of $ 360.00.
3. That s/he has following assets which are valued as shown:

		Yes	No	Value/Equity*
a.	Savings account		X	
b.	Checking account		X	
c.	Cash		X	
d.	Miscellaneous funds		X	
e.	Money owed him/her		X	
f.	Stocks and/or bonds		X	
g.	Real estate		X	
h.	Automobile(s) and other vehicle(s)	X		$800.00
i.	Personal property		X	
j.	Life insurance (list cash value)		X	
k.	Other assets not listed above		X	

*Cash value to client after payment of all mortgages or loans.

4. That s/he anticipates the following unusual, special, and/or emergency expenses in the next 8 months (if a felony case), or in the next 4 months (all other cases):

TYPE	AMOUNT
Surgery	@$200.00
Trial Attorney Fees	$6700.00
Jackson Clinic	$1200.00

5. That bail in this case is: $ n/a
6. That s/he believes him/herself to be indigent, desires the assistance of counsel, that s/he does not have sufficient funds to hire counsel, and that no one will hire counsel for him/her.
7. That s/he understands any material misrepresentation herein could subject him/her to a felony charge of false swearing pursuant to sec. 946.31, Wis. Stats.
8. That s/he agrees to promptly inform the State Public Defender or his/her attorney of any change in the above information.

Edward G Welsh
Defendant

Subscribed and sworn to before me this 23rd day of September, 1980.

John C. Crabtree
Notary Public, State of Wisconsin
My commission is permanent

I understand that I may appeal to the court any determination that I am not eligible for appointed counsel. Sec. 977.07(3), Wis. Stats.

(from affidavit)

COMPUTATIONS

1.	Cash assets (total of lines a, b, c, d, e)	$
2.	Stocks and/or bonds (line f)	$
3.	Equity of real estate, vehicles, and personal property (25% of lines g, h, i)	$ 200.00
4.	Cash value of life insurance (line j)	$
5.	Total of other assets (line k)	$
6.	TOTAL ASSETS (total of lines 1-5 above):	$ 200.00
7.	Monthly income:	
	a. Monthly income (total lines 1-2 from affidavit)	$ 360.00
	b. Monthly expenditures (from schedule in Appendix 10b from procedures manual)	$ 472.00
	c. Difference (subtract 7b from 7a)	$ -112.00
	d. Line 7c times 8 if felony case or times 4 in all other cases	$ X 8
8.	TOTAL SPENDABLE MONTHLY INCOME (from line 7d above)	$ -896.00
9.	TOTAL (lines 6 and 8 above):	$ -696.00
10.	Total unusual, emergency or special expenses (total of line 4 of affidavit)	$ 8100.00
11.	Amount necessary to post bail	$ —
12.	TOTAL (lines 10-11)	$ 8100.00

INDIGENCY DETERMINATION

A.	Enter line 9 from above	$ -696.00
B.	Enter line 12 from above	$ 8100.00
C.	Difference (subtract line 12 from line 9)	$ -8796.00
D.	Anticipated cost of counsel (from SPD 3.02)	$ 1500.00

1. Client indigent if line C is 0% to 50% of line D.
2. Client is partially indigent if line C is 50% to 100% of line D. Partial payment required of up to amount shown on line 6 above, but not to exceed 50% of line D.
3. Client is partially indigent if line C is 100% to 150% of line D. Partial payment required of up to amount shown on line 6 plus up to 50% of line D.
4. Client is not indigent if line C is more than 150% of line D.

Client is: Not indigent ___; Indigent ✓; Partially indigent ___: (If partially indigent, client must pay $_____.)

1. Lump sum due: $_____ by _____.
2. Partial payments of $_____ for ___ months commencing on _____.

As a condition of my receiving public paid counsel, I hereby agree to make the payment(s) indicated above.

_____
Defendant

Approved:

M. Priehe
Staff person conducting evaluation

_____
Local Representative

Office-Supreme Court, U.S.
FILED
APR 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-5466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDWARD G. WELSH,

PETITIONER,

v.

STATE OF WISCONSIN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

JOINT APPENDIX

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Counsel for
Respondent

PETITION FOR CERTIORARI FILED
SEPTEMBER 27, 1982

CERTIORARI GRANTED FEBRUARY 22, 1983

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

April 24, 1978 - Citation E 49170 issued by Madison police to Edward G. Welsh.

April 24, 1978 - Madison police report refusal to submit to chemical test for alcohol.

April 26, 1978 - Notice of Intention to Suspend Operating Privilege.

May 4, 1978 - Defendant requests hearing on reasonableness of refusal to take chemical test.

February 25, 1980 - New Criminal Complaint and Summons issued and served on Edward G. Welsh.

March 7, 1980 - Minute Sheet noting initial appearances.

March 7, 1980 - Defendant signs recognizance bond in lieu of $284 bail.

March 13, 1980 - Defendant's notice

of motion and motion to dismiss complaint filed.

July 14, 1980 - Evidentiary hearing on defendant's motions before Judge Mark A. Frankel in Dane County Circuit Court.

July 31, 1980 - Notice of a hearing on reasonableness of failure to submit to chemical test served.

September 5, 1980 - Hearing on defendant's claim that refusal to take chemical test was reasonable.

September 5, 1980 - Minute Sheet reporting disposition of proceedings at hearing.

September 15, 1980 - Defendant files motion to appeal to Court of Appeals, District IV.

May 26, 1981 - Decision and opinion of Court of Appeals, District IV, Wisconsin.

October 19, 1981 - Petition for

Review of Court of Appeals decision granted by the Wisconsin Supreme Court.

July 2, 1982 - Decision of the Wisconsin Supreme Court in State v. Welsh.

August 2, 1982 - Remittitur of the Wisconsin Supreme Court.

STATE OF WISCONSIN CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. CRIMINAL COMPLAINT AND SUMMONS

EDWARD G. WELSH, DOB 9/2/33
7158 Tree Lane
Madison, Wisconsin,

Case No. 80CT0243

Defendant.

James Joachim, being first duly sworn, on oath says that on April 24, 1978, at the City of Madison, in said County, the defendant did: unlawfully and intentionally operate a motor vehicle while under the influence of an intoxicant; contrary to Section 346.63(1)(a) of the Wisconsin Statutes; and upon conviction may be imprisoned not less than five days, nor more than one year, and in addition may be fined not more than $500.00; contrary to Sec. 346.63(1)(a), Wisconsin Statutes, and

prays that said defendant be dealt with according to law; and that the basis for the complainant's charge of such offense is:

*1) FACTS: On April 24, 1978, at approximately 8:49 p.m. Madison Police Officer Daley was dispatched to the area of Westfield Place and Mineral Point Road, City of Madison, Dane County, Wisconsin, with reference to a vehicle driving on the cemetery. Upon arrival at said location, Daley states that he contacted Randy Jablonic, who stated that he was driving on Mineral Point Road when he observed a vehicle proceeding inbound on Mineral Point Road almost strike another on-coming vehicle, and then continue to cross the median cement divider and go onto the Sunset Memorial Gardens Cemetery grounds for approximately 150 feet. Jablonic stated that he observed the

driver of that vehicle, later identified as Edward G. Welsh, exit the vehicle and stumble as if he was intoxicated. Jablonic stated that Welsh asked him if he would not call the police, and Welsh then left the cemetery and staggered off in a northeasterly direction towards Tree Lane. Jablonic described Welsh as being a white male about 40 years old, 5'8" tall, and stated that Welsh was wearing a tan leather coat and light pants. Jablonic also stated that the vehicle Welsh was driving was a 1974 Buick with Wisconsin license number YE1289. Daley states that he ran the above information through the Department of Motor Vehicles which indicated that the above vehicle was registered to the defendant, and that the defendant's address was 7158 Tree Lane. Daley stated that he then proceeded to that location

where he contacted the defendant's wife, Patricia Welsh, who stated that her husband, Edward Welsh, just minutes earlier, stumbled into the house, highly intoxicated, and that he just went straight to bed. Daley stated that he then contacted the defendant, who fit the general description previously given, and was wearing clothing that matched the description which was supplied by Jablonic. Daley stated that the defendant was then arrested for operating a motor vehicle while under the influence of an intoxicant and issued a citation for the same. (A copy of the citation is incorporated in this complaint.)

**2) AND THAT THIS COMPLAINT IS BASED ON: Information and belief of your complainant, an Officer with the Madison Police Department, who has read the reports of Officer Daley, whom your

complainant believes to be truthful and reliable based upon past professional contacts and whose reports have always proven to be truthful and reliable. Your complainant further believes the statements of Randy Jablonic to be truthful and reliable in that he is a citizen informant and eye witness to the above offense. Your complainant further believes the statement of Patricia Welsh to be truthful and reliable in that she is a citizen informant. [Oath deleted in this printing]

STATE OF WISCONSIN
DANE COUNTY

CIRCUIT COURT
BRANCH 12

STATE OF WISCONSIN,

Plaintiff,

Case No. 80CT0243

vs.

Evidentiary Hearing

EDWARD G. WELCH,

Defendant.

DATE: July 14, 1980

BEFORE: The Honorable MARK A. FRANKEL, Circuit Court Branch 12 Presiding Judge

APPEARANCES: JOHN STEWART, Assistant District Attorney for Dane County, appeared on behalf of the State of Wisconsin.

The Defendant appeared in person, and by ARCHIE SIMONSON, Attorney at Law.

PROCEEDINGS: Excerpt of Proceedings held in the Evidentiary Hearing.

. . .

PATRICIA WELCH,

having been called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SIMONSON:

. . .

[R.13:3]

Q Now, you had two daughters of a previous marriage, did you not?

A Yes.

Q What are their names?

A Lesa and Laurie Johnson (phonetic spellings).

Q We are talking about an incident in April 24 of 1978. Do you remember that date?

A Roughly.

Q That evening.

A Vaguely.

Q Vaguely, all right. At that time how old was Lesa? What was her birthdate?

[R. 13-4]

A 5/10/61.

Q And how about Laurie?

A 3-28-62.

Q So one of them was 16--well, one--yah, one was 16.

A They were both 16 then.

Q Yes, I guess that is right. They are both 16 years of age at that time. Were your daughters present that evening with you?

A Yes.

[R.13:50]

Q Now, these--at the time the officers came to the door that evening, these are the two girls that answered the door?

A Yes.

Q You were upstairs at the time?

A Yes.

Q You did not leave the officers in, did you?

A No.

Q The first time you encountered the officers you were upstairs?

A Yes.

Q So, you don't know what transpired at the door?

A No, I don't.

Q And what you do know is what has been related to you by your daughters?

A Yes.

. . . [R.13:6]

Q And now neither one of them are available for testimony?

A Right.

Q You and your daughter, Laurie, prepared for the hearing in my office, by giving me statements as to what transpired at the door of the residence?

A Yes.

Q On the evening of--and you already testified on the day we were before Judge Boll?

A Yes.

Q And you were present at that time

when the State was not ready to proceed?

A Yes.

Q They asked for a continuation?

A Yes.

. . .

[R. 14:3]

THE COURT: All right, ma'am, you are excused. I may attempt to short circuit a major evidentiary hearing here if the State is prepared to stipulate [R. 14:4] to the Defense's assertion that the defendant was arrested in his home without a warrant. Perhaps we can proceed to find out what justification or what explanation the State has for that claim--illegal or warrantless arrest. That is the crux of your claim of prejudice that you can't prove or assert--adequately present testimony on a claim the defendant was arrested at

the home. Is that correct, Mr. Simonson?

MR. SIMONSON: It goes to the excuse, yes.

. . .

[R.14:5] MR. STEWART: All right. We would stipulate that the defendant was arrested in his house by Officer Daley on the 24th of April, 1978, without a warrant.

[R.14:6] THE COURT: And what is the State's claim with respect to the defendant's motion to dismiss for a warrantless arrest in terms of either exigency or a claim of hot pursuit or what have you that would allow the Court to maintain jurisdiction over the defendant based on that?

MR. STEWART: The State's position is that those factors existed at the time the arrest was made.

THE COURT: Which factors?

MR. STEWART: A hot pursuit and the fact that they were--the State was attempting to--because of the nature of this charge, the State was attempting to conserve evidence; that is namely, the importance of getting Mr. Welsh under arrest immediately because of the nature of the charge--operating under the influence.

THE COURT: And, Mr. Simonson, more specifically, what is your claim with respect to what testimony or what evidence you anticipated the two daughters giving that might bear on the State's attempt to assert either hot pursuit or exigent circumstances?

MR. SIMONSON: We, obviously, deny they do not fall within any of the exceptions.

THE COURT: I understand that. I am asking you what testimony or what evidence did you anticipate

adducing from these now supposedly missing witnesses that [R.14:7] would bear on those two questions?

MR. SIMONSON: There would be a time element which was important about hot pursuit and entry into the home.

THE COURT: Well, the State is willing to stipulate to entry into the home, I take it. I just--

MR. SIMONSON: Then there is a time element involved.

THE COURT: Well, why cannot Mrs. Welsh testify with equal competence to the--either the--the defendant's wife or the defendant himself as to the time element, apart from the daughters?

MR. SIMONSON: I understand. If the State will stipulate that they were not admitted into the home by the daughters, then we could proceed with

the testimony of Mrs. Welsh.

THE COURT: What was that now? What did you just say?

MR. SIMONSON: If the State will stipulate that the daughters did not voluntarily admit the officers into the house, then we can proceed with Mrs. Welsh's testimony. That is a case out of Portage. I forgot the name of it.

THE COURT: Are you saying the daughters would testify to the question of the admission being consensual? [R.14:8] MR. SIMONSON: Yes.

THE COURT: Does the State take the position that the officers were consensually admitted to the house and that was the--

MR. STEWART: We take the position that it was a consensual entry into the household.

THE COURT: Now, the daughters

or one of the daughters?

MR. STEWART: Through the daughter and then through Mrs. Welsh.

THE COURT: Through the defendant's wife?

MR. STEWART: Yes, and the defendant's daughter.

MR. SIMONSON: Judge, just so you get your thinking straight, I think the State will admit that the officer knocked at the door, the daughters responded, "We're not here." And during whatever conversation allegedly transpired at the door, the officers walked in. They walked up the stairs. As they are going up the steps they encounter Mrs. Welsh. So, whatever transpired down at the door is in the testimony of the officers. I think there is two or three officers and two daughters.

THE COURT: Well, it seems to

me that the State has multiple grounds it is advancing that would justify-- that would theoretically justify the warrantless [R.14:9] arrest in the home. One is, hot pursuit. And one is, exigent circumstances. And one is, consent.

MR. SIMONSON: They didn't mention it, but I thought I would bring it to your attention. They didn't mention consent.

THE COURT: They did not mention it, but you have just apparently placed that in issue, and apparently that is in issue. It would seem to me that the only time that the defendant might show any irretrievable prejudice is in the event the State would not meet its burden with respect to showing exigent circumstances or hot pursuit, and then tried to rest the validity of the arrest solely upon consent. If

they could show either hot pursuit or exigent circumstances, the consent really--really is unnecessary in terms of their need to justify a warrantless arrest. You take issue with that construction?

MR. SIMONSON: Yes.

. . .[R.14:10]

THE COURT: Well, as I understand it then, the very recent case of--I believe it is Peton vs. Knox (phonetic spellings), the Court said that warrantless arrests in the home were invalid or unconstitutional absent such things as exigent circumstances, hot pursuit or consent. It was not my reading of that case that they said you must have all three. Is that how you read the case?

. . .[R.14:11]

THE COURT: Well, for the purpose of this hearing--and I have

read the last case as well--I would hold that the State does not have to exercise multiple justifications for a warrantless arrest. There are simply a series of well-defined and narrow exceptions to the warrant requirement, any one of which, if satisfied, would justify the use of a warrantless arrest. And I think, in order to avoid the possible conflict, I will turn to Mr. Stewart now and see if he can establish one of the exceptions to the warrant requirement, which he has obviously undertaken to do, by his acknowledgement that there was a warrantless arrest in the home. And if we can avoid even dealing with the issue of consent, because apparently that is really the only major issue that the two supposedly missing witnesses would have relevant testimnony on. Perhaps we can resolve the [R.14:12] issue

without having to get into the issue of consent.

. . .

[R.13:7]

RANDY JABLONIC

Having been called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STEWART:

. . .[R.13:13]

Q Now, approximately--or can you approximate how much time elapsed between the time that you made conversation or had conversation with the defendant? Well, let me put it this way; did a police officer arrive on the scene?

A Yes, sir.

Q How much time elapsed between the time the police officer--his coming on the scene and the defendant departing the scene?

A I really couldn't say how much time. If I were to say shortly thereafter it may be something like three minutes--five minutes. You know, when you are waiting time can seem to be a long time. And yet it wasn't--I would have to say just in plain terms, very shortly thereafter. And then as soon as the officer came over to there, I immediately went up and spoke to the officer and told him what had happened and that--

Q What did you tell the officer? Did you give the officer a description of the individual you had been talking to? [R.13:14]

A I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to per-

form. And it was my feeling that he had taken off across the field.

Q What did you base your opinion on that he was inebriated?

A Well, first of all the erratic motion of the car, and then the staggering and slurred speech that he exhibited when he was trying to talk to me.

Q You have seen people or persons under the influence of an intoxicant before?

A Working at the University, it's a common--very common to see many inebriated people, unfortunately.

. . .

CROSS EXAMINATION BY MR. SIMONSON:

. . .[R.13:16]

Q Actually, you do not recall the time that this incident occurred, do you?

A In the back of my mind I remember

thinking that--I told my wife something--I was going to be home. And I was trying to get home to the family, and I would have thought it was after--you know, it was dark. And it was raining. And it was later than I had wanted to get home. And I don't recall if we mentioned a time here, but it seemed to me it was 8:30, or something like that--9:00. I don't specifically recall right here now.

Q It could have been right around 8:30 or 8:00? Between 8:00 and 8:30?

A If that is your pleasure. I don't recall distinctly the exact time that it occurred.

. . . [R. 13-20]

Q You mentioned something that is very interesting--that it was rainy, foggy.

A It was rainy. It was wet, and rainy. When I say "foggy" it may not have been that foggy, but it was a very--it was what you call a poor visibility that evening.

. . .[R.13:22]

Q Now, then so at the time that he is leaving you are--you for the last time, it appears that 15-20 minutes has elapsed since the incident first started.

A That is probably on the outside of the total amount of time. That is the maximum amount of time it would have occurred, by far.

Q At the time he left your presence, the police are not there?

A That is correct.

Q And I think he took off across the field or open area, is that right? [R.13:23]

A Well, he went down the road, and

then, as I recall, towards the east. And it was a grassy area. I thought he was going to circle back to go back to the car.

Q He disappeared from sight?

A Right.

Q At the time he disappears from sight, the police are not there?

A That is correct.

Q And after he disappears from sight, how much time elapsed before the police arrived?

A Well, it is two years ago. But I can recall wondering--I was thinking about it at that time. I was thinking, he is gone. The car is here. Well, I better not leave even though the driver is gone. I better stay and, you know--just about at the same time I am thinking these things, why the police pulled up.

Q So, an unknown period of time further elapsed?

A It was a shorter period of time than--I mean it was practically immediately upon, you know, his departure, because I had barely time to think about, hey this guy is gone. And I am sitting here. What will I do. And then the police come up. And then--you can say this in 10 seconds. But, you know, maybe it was a minute. Or something like that.

Q Or several minutes? [R.13:24]

A I am not--

Q It could have been another five minutes or so?

A That, again, would be the outside, I would say.

. . . [R.13:26]

RICHARD DALEY,

having been called as a witness, being

first duly sworn, [R.13:27] testified as follows:

DIRECT EXAMINATION BY MR. STEWART:

Q State your name for the record.

A Richard J. Daley.

Q Your occupation?

A Police officer for the City of Madison.

Q Were you so employed on the 24th day of April, 1978?

A Yes.

Q And on duty the evening hours of that date?

A Yes.

Q And did you have occasion to be dispatched to any location in the city of Madison at around 8:49 p.m.?

A Yes, I did.

Q Where did you go?

A I was dispatched to the area near Westfield Drive on Mineral Point Road, almost adjacent to West Towne

Mall.

Q Who did you see there, if anyone?

A I met Mr. Jablonic.

Q Is he the individual that just left the courtroom?

A Yes, he was.

Q And did Mr. Jablonic give you some information about an individual operating under the influence?

A Yes, he did.

Q And did he point out an automobile that he stated to you the individual was operating? [R.13:28]

A Yes, he did.

Q And do you recall whether or not that automobile had a license plate on it?

A Yes, it did.

Q And do you recall whether or not you took any action with respect to the license plate number of that vehicle?

A Yes, I ran a data check with the Motor Vehicle Department.

Q What is that?

A That is a radio data control person who checks, via computer, the registration of the vehicle through the Motor Vehicle Department.

Q And did you receive some information?

A Yes.

Q And specifically, did that information tell you the owner or whoever that vehicle was registered to?

A Yes, the registrant.

Q And what name was that?

A That was Edward Welch of 7158 Tree Lane.

Q Do you recall whether or not Mr. Jablonic told you the direction or the street that this individual had gone when he left Mr. Jablonic's presence?

A Yes.

Q What did he say?

A He pointed in the direction across the field, which would be in a northeasterly direction, which is a [R.13:29] field--was Burning Hart Lane (phonetic spelling). It is adjacent to the cemetery, and it leads towards Tree Lane.

Q All right.

. . . [R.13:29]

Q Officer, what did you do? Did Mr. Jablonic give you a description of the individual that was operating the vehicle?

A Yes, he gave me a description of the incident he had observed, and a description of the person he had talked to from the vehicle.

Q Do you recall whether or not he said anything about this individual being under the influence?

A Yes, he had a definite opinion about that.

Q What did he tell you? [R.13:30]

A He said the man was very obviously intoxicated.

A He indicated to you he observed the individual operate the motor vehicle?

A Yes, he did.

Q He told you where he had seen this operation?

A Yes.

Q How much time between the time that you received this information from Mr. Jablonic--well, let's put it this way. Did you go to 7158 Tree Lane?

A Yes, I did.

Q How much time between the time you are discussing this when you got the information from Mr. Jablonic, and your arrival at 7158 Tree Lane?

A I would say that I was in Mr. Jablonic's presence about less than five minutes. And I proceeded directly to Tree Lane, which would have maybe taken a minute and a half, at the most.

A And were you familiar with that location?

A Yes, I was.

Q How so?

A I had an earlier call, perhaps within the week or two weeks prior to that, in which--when I ran the data check of the license plate, and the name came back Edward Welch of 7158 Tree Lane, I recognized that as having been there on an alcoholic related disturbance [R.13:31] in which we, in fact, arrested Mr. Welch prior. So, I knew the name and knew the address.

THE COURT: When you say "we,"

were you involved in that arrest?

A Yes, I was. I was dispatched to assist another officer on that.

Q Upon arrival at 7158 Tree Lane, you knew Mr. Welch resided at that location--I mean from your information?

A Yes, from having heard his name through data I recognized the name and the address.

Q What did you do upon arrival at that location?

A We knocked on the door and--Officer Harless (phonetic spelling) and I. And the door opened and someone opened the door, and we contacted--it was one of his stepdaughters, I believe.

Q What did you say to her?

A We informed her there had been an accident and that we strongly suspected Mr. Welch of having had the

accident and having run home. And we asked that we be able to talk to him.

Q What did she say to you?

MR. SIMONSON: I object to that question being asked and answered. Hearsay.

THE COURT: Well, I think it is being admitted for several purposes at this point: one, to [R.13:32] show prejudice or to find out what the version of that witness may be and--

MR. STEWART: Your Honor, we are going to probable cause. And hearsay is not an objection to the probable cause portion of this hearing.

THE COURT: I would construe this to be a preliminary question of fact that has to do with the admissibility of evidence under

911.01 (4). And under that provision the rules of evidence are made specifically applicable. And under that statutory provision, I feel the officer could answer that.

MR. STEWART:

Q Do you recall the question?

A Would you repeat it, please.

Q I think the question--actually, I forgot.

THE COURT: Officer Daley, what was the defendant's stepdaughter's response when you asked to speak to him?

A She stated something to the effect that he had just stumbled in. It wasn't he had just come in or anything. It was like he just stumbled in and went upstairs, and beckoned us in--allowed us in.

Q What do you mean by she "beckoned you?"

A She opened the door, and she said, "He is upstairs," pointing to the stairway, and that he had just [R.13:33] stumbled in and he is upstairs. And motioned to us, so to speak, that we could go up there.

Q Show the Judge what motion she made towards you or to you.

A Well, she said, "He just stumbled in," or something to that affect. And said, "He is upstairs," and motioned that way--towards the stairs, allowing us to pass.

THE COURT: Go ahead, Mr. Stewart.

Q And did there come a time that that person who identified herself as Patricia Welch, appeared on the scene?

A Yes.

Q Where did you see her?

A I believe we were starting up the

stairs, and she appeared from what I think was the kitchen area. And as we were going up the stairs she stated, you know. "What is going on," or something like that. And we told her that--again, we explained there had been an accident, and that we strongly suspected Mr. Welch of having been involved in the accident. And we would like to speak with him because we thought he was probably under the influence of an intoxicant. And she, at that point, also gave her consent for us to go up, because she said, "Yes, he is in bed. He just got into bed. And something has to be done," referring [R.13:34] to the fact that she recognized me from the earlier-- I assumed she recognized me from the earlier case, and was, I think, saying that she was

concerned about his alcoholic problem. And she indicated, "Something has to be done," and motioned us to the bedroom, or showed us the bedroom where he was at.

Q At any time did she tell you, or his stepdaughter--the defendant's stepdaughter, not to come into the residence?

A No.

Q At any time did they attempt to push you out or restrain you from entering?

A No, I found them to be actually cooperative the other way.

Q When you arrived at the scene with fellow officer--is it Harless--is his name?

A Yes.

Q I take it you were in uniform?

A Yes, both of us.

Q Both of you. Did you have your

weapons in the holster or out of your holster?

A In-holster. Nothing like forced.

Q Did you make any threats towards Patricia Welch or her daughter?

A No.

Q Do you recall either one--that is, Patricia or her [R.13:35] step-daughter, mention anything about Mr. Welch's state of intoxication?

A She just said, "Something has to be done."

THE COURT: "She" being Mrs. Welch?

A Mrs. Welch, the wife. Which seemed to be an acknowledgement that she knew he was intoxicated, and that he had made his way to the bedroom. And she was worried about his condition.

Q Do you recall any statement made by her stating he was highly intoxi-

cated?

A No, not a specific statement. I think it was more--I don't remember a specific statement. I think it was more of an understanding that she knew what the condition was, and she wanted him to get some help.

. . .

MR. STEWART: [R.13:36] . . .

Q Have a look at Exhibit 1 for identification. Do you recognize that exhibit?

A Yes, I do.

Q What is it?

A It is my official officer's report on the incident and the arrest and the contents of the circumstances of that evening.

Q Is there a paragraph--specifically paragraph one--two--three. I believe the Defense has a copy of that, with reference to statements

by Patricia Welch and her husband's state of intoxication.

A Yes, there is. I quote: "I contacted his wife, Patricia, and she stated had, just minutes earlier, stumbled into the house highly intoxicated, and that he went straight to bed."

Q Does that refresh your recollection whether or not she made some statements about his state of intoxication?

A Yes, it does.

Q And it is that he was intoxicated?

A That she said that.

Q Highly intoxicated. All right, did you go upstairs? [R.13:37]

A Yes.

Q And what did you see?

A Well, what we saw on the way upstairs was wet and muddy tracks going, you know, to the bedroom.

And arriving to the bedroom, that she showed us, we observed Mr. Welch lying in bed with no clothes on, and muddy pants immediately next to the bed.

Q All right, and what did you say, if anything, to Mr. Welch?

A We asked him to get up and put on his pants, and that we wanted to speak with him.

Q Did he get up?

A Yes, he did.

Q And did he put his pants on?

Q And what happened after that?

A In speaking with him we could notice the whole room smelled of alcohol. He had a very heavy odor of alcohol about his person. In speaking to him, his speech was very slurred, and so forth. And we had asked both the wife and the stepdaughter, earlier, had he had

anything to drink upon entering the home, and so forth. And they had told us no. We asked him if he had anything to drink, and he said, "No."

. . . [R.13:38]

Q . . . You understand that--are you trained, when you make an arrest for operating under the influence, that you should get that person downtown as soon as poosible?

A Yes.

Q And do you know why?

A Yes.

Q Do you understand that--well, why do you have to get them down there as soon as possible?

A Well, because the alcohol dissipates in the body after a certain period of time. And there are requirements--I believe, it is two hours, that once you submit to the

breathalyzer or some form of blood alcohol test, within two hours of the observed--drive him--or accident etc.

Q Did you place Mr. Welch under arrest?

A Yes, we informed him he was under arrest at that point.

Q Was that inside his house or outside?

A Inside his bedroom.

Q Now, prior to placing him under arrest, what observations--you mentioned some. What did you arrest him for?

A Driving while under the influence of an [R.13:39] intoxicant.

Q What observations did you make with respect to the fact that you felt he was under the influence of an intoxicant?

A In speaking with him, the very

strong odor of alcohol about his breath, the fact that he had to be helped putting on his pants. We had to hold him up, literally. The slurred speech.

. . . [R.13:40]

Q You issued him a citation?

A Yes, we did.

Q For what?

A Driving while under the influence of an intoxicant.

Q And this all occurred in Dane County?

A Yes, it did.

. . .

CROSS EXAMINATION BY MR. SIMONSON:

. . . [R.13:41]

Q So, the 8:45 is when the call came in?

A I believe it is 8:49.

Q Excuse me, 8:49 is when the call came in.

A Yes.

Q So, it takes--within a minute you were dispatched. Where were you located at that time?

A I really couldn't say. I mean I was somewhere in the area. That was my patrol beat. And I would think maybe somewhere within half a mile or so maybe.

Q So it would take a few minutes to get there nonetheless.

A Yes.

Q Anywhere from three to five minutes I suspect.

A I would think from the time I was dispatched, to the time I arrived, might be a minute to two at the very most.

. . .

[R.13:42]

Q You do not know whether or not the defendant had anything to drink

between the time he left Mr. Jablonic's presence and your contacting him in his bedroom? You personally do not know that?

A I personally do not.

Q And so, again, your information is dependent on what other people may have told you? [R.13:43]

A Yes.

Q And usually when you arrest one for intoxicated driving, you try to make sure that they do not have access to anything that would complicate or contaminate the breath sample, is that right?

A That is true.

Q Normally, you would have them under constant observation, even in your own squad car, to make sure they have no cigarettes or--obviously, nothing to drink in your presence. And you admit that there is a span

of time that elapsed since the incident, and before your contacting the defendant?

A Yes.

Q And it is possible, is it not, that during that span of time he could have ingested some alcohol?

A It is possible. Although I do not see how he had opportunity.

. . .

[R.13:44]

(Patricia Welch recalled as a witness.)

FURTHER EXAMINATION BY MR. SIMONSON:

. . .

[R.13:45]

Q Sometime that evening you observed your husband come home?

A Yes.

Q Do you remember the time that he came home?

A No, I wasn't paying any attention.

Probably around 9:00 or a little before. But I don't remember for sure.

. . .

[R.13:46]

Q You and your husband share the same bedroom?

A Yes.

Q Did he, on that evening, have a bottle of liquor up there? [R.13:47]

A As far as I know he did.

Q That is customary?

A Yes.

. . . [R.13:47]

Q And sometime later, officers appeared at the house?

A Um-hum. [R.13:48]

Q Is that right?

A Yes.

Q Where were you at that time?

A Upstairs.

Q You weren't in the kitchen?

A No.

Q But your daughters were downstairs?

A Yes.

Q And you testified before, one of your daughters or both of them opened up the door in response to a knock, I guess.

A Yes.

Q You don't know what transpired down there?

A No.

Q But did you talk to your daughters afterward about what happened downstairs?

A I suppose I did.

Q But you were in my office when one of your daughters gave me a statement of what transpired, right?

A Um-hum.

Q And the Judge allowed the officer to testify what your daughter said. So, I am going to ask you

what your daughter said to--what your daughter told you. Didn't your daughter tell you that the officer merely asked if Mr. Welch was there? [R.13:49]

A I assume they did.

Q And they said, "Yes"--your daughter responded, "Yes?"

A Um-hum.

Q And that the officer came in, in response to the "Yes," is that right?

A As far as I know.

. . .

Q Can you recall what your daughter told you--she told the officer? If you don't, say so. That is all.

A All I remember is when I asked her, she said, "Well, police were at the door." And all I remember is that everything being really confused. And she said, "What was I supposed

to do? So, I let them in." And that is really about all I can remember. [R.13:50]

Q So, you don't know the specific conversation that transpired?

A No.

Q But they came in, and after they came in you encountered one of the officers?

A Yes, I was coming down the stairs, and one of them was coming up the stairs.

Q Do you remember what the officer asked you or said to you?

A I think they asked me if he was upstairs. And I said, "Yes."

Q The officer read into the record this statement. Listen carefully: "I contacted his wife, Patricia, and she stated that her husband had just, minutes earlier, stumbled into the house." Did you say that

to the officer?

A I don't believe that I would have said, "Just minutes earlier," because I just don't--I would have said 15 minutes or half hour or an hour--45 minutes or an hour. "Minutes earlier," isn't the way I talk.

Q As a matter of fact, how much time elapsed between the time that he had come home and the officers came to the house?

A Half an hour to 45 minutes.

. . .

[R.13:51]

Q But your testimony is that it might have been a half hour to 45 minutes later that the officer came to the house?

A I think so, yes.

Q This is after he was home already?

[R.13:52]

A Yes.

Q And then the officers arrested him and he was instructed to put on his clothes. Were you up in the bedroom at that time?

A No, I don't think so. I think I was downstairs.

. . .

Q Did you give the officers authority to enter the house?

A No.

Q Ever?

A No.

Q How many officers were there?

A Three.

. . .

[R.14:14]

THE COURT: All right, do you wish to offer the statement of either the daughters that you apparently took, into evidence? You indicated you took a statement

from one of Mr. Welsh's daughters that may well be provative of part of your argument.

MR. STEWART: Your Honor, I am a little bit confused. I thought one of the arguments of the Defense was that they didn't have an opportunity to--that they had lost some vital testimony. I was unaware that they had a statement. That pretty much indicates--

THE COURT: Well, I was unaware they had a statement until Mr. Simonson indicated that on his examination of Mrs. Welsh. At least that was certainly implicit in one of your questions of Mrs. Welsh. Mrs. Welsh was present when you were interviewing the daughter and taking a statement from her?

MR. SIMONSON: Yes, I have a statement. For what it is worth, I

can put it in if there is no objection.

THE COURT: I doubt Mr. Stewart would have an objection to that.

. . .

[R.14:15]

THE COURT: Well, let's take a look at what you do have, and we will allow you to make a copy. Give that to my clerk and we will have that marked as Exhibit 2.

. . .

[R.14:16]

MR. SIMONSON: I first, at your suggestion, I will offer Exhibit 2.

THE COURT: I will receive Exhibit 2.

. . .

[R.14:23]

THE COURT: . . . And we will

go on from there to the [R.14:24] defendant's motion seeking dismissal on the basis that there was a warrantless arrest of the defendant in his personal residence. And I will hear from you, Mr. Stewart, because it is--Mr. Simonson correctly indicates, I believe, the burden is on you to show one of the possible exceptions to the warrant requirement.

MR. STEWART: Judge, it is the State's position that this situation occurred--basically, what we are dealing with is probable cause that the officer reasonably, prudently, as an officer with the information placed before him,, and did that information give him probable cause to believe that the defendant had committed a crime. We have testimony from Mr. Jablonic

that quite clearly on the record indicates that the defendant was operating a motor vehicle in Dane County; that Mr. Jablonic's testimony that the defendant was under the influence of an intoxicant. He informed the Court of his experience--that is, he observed people under the influence before. He gave this information almost immediately, as he testified to Officer Daley, who arrived on the scene. The information that Mr. Jablonic--well, his observations, plus a description of the defendant, plus he pointed out the vehicle that the defendant was operating. Officer Daley, with that information, in addition to a record check made getting an address of Mr. Jablonic, (sic) [R.14:25] a person that the officer was familiar with from a

previous encounter involving alcohol. That added to the information given by Mr. Jablonic, he proceeded immediately to the Tree Lane residence and was admitted into the residence by one of the defendant's daughters.

The officer testified--and it is not--no evidence was introduced to the contrary--his testimony that they knocked on the door. They were in police uniforms. They did not have their weapons drawn. They did not make any threats to anyone or demand entry. They simply made a request whether or not the defendant resided in that residence, and the daughter indicated, yes, and that he was upstairs and that she gestured to him, "He is up the stairs there." The testimony of the officer with respect to the

defendant's wife that she also indicated that the defendant was upstairs, and basically made a request for the officer to do something about it. The officer testified that he had been dispatched to that residence before and thought that the defendant's wife recognized him from a previous occasion. And, again, upon her request, he went upstairs again. There was no testimony--and I put questions to her whether or not anyone had requested the officers to leave. Whether or not the officers--well, the testimony at least to the officers whether or not they had made threats. I think [R.14:26] we have established from the officer's testimony that he is familiar--his observation of the defendant, that his clothing fit

the description of the person Mr. Jablonic had described to him. The officer testified that Mr. Welsh fit the description, personally, of the person that was identified by Mr. Jablonic.

He testified that there were--he observed water marks on the floor, which I think would indicate that the water marks or the mud marks were put there recently. Not 45 or half an hour later. He also testified, from his experience as a police officer, he is aware of the fact that it is important to preserve evidence. That is, to get a person that is under the influence--if he has probable cause--to get them downtown as quickly as possible to get a breathalyzer sample as evidence of intoxication. I know for that fact, in

addition to the fact that he proceeded immediately, as Mr. Jablonic stated, that the defendant had just left his sight. The officer arrived on the scene. I think we have hot pursuit, and I think we have established the situation where it was very important that the officer entered a dwelling and made the arrest. We also have a consent. So, I think we have three exceptions to the arrest without a warrant.

THE COURT: Thank you, Mr. Stewart. Mr. Simonson. [R.14:27]

MR. SIMONSON: Judge, the record is obviously clear that the State does not come within any of the 13 exceptions to the warrantless arrest prohibition. Apparently, they are relying upon hot pursuit and consent. I heard--and

perhaps also exigent circumstances --what that broad term may envision.

First of all, as to--as to hot pursuit. In all the cases of hot pursuit the defendant has to be within the eyeball distance--vision of the officers, and they have to be pursuing him, and they have to be--have little--minimal break in observation in the chase, in the light. According to Mr. Jablonic's testimony, that as much as between the time of the incident of the accident and--and when the officers arrived at the house or left him at that point in time, about 20--25 minutes had elapsed. Then they contacted the officer. Could we have another five minutes or so? That is getting us pretty close to a half an hour. Now, what I am saying is that the officers arrived

too late to be in hot pursuit. And I think the hot pursuit argument is definitely out the window.

Exigent circumstances--there are many things that I would guess in a drunken driving charge that perhaps would be the destruction of evidence, or whatever the case may be, but also the officer should take into consideration [R.14:28] whether or not there has been anything intervening; the same lapse of time--a lot of things can happen.

THE COURT: Are you saying it would have been reasonable to expect the officer to go get a warrant at that point, and that could have been accomplished in time to still preserve evidence of possible intoxication?

MR. SIMONSON: Yes. At that time--that point in time the offi-

cer should have gotten a warrant for his arrest, but not for drunken driving. Maybe for reckless driving--erratically, but not for drunken driving. He could have gotten that if that is what he needed, or else issued a citation. But the evidence was too cold to charge this man with drunken driving because of a lot of intervening things. Like his wife testified, that he did have a bottle up in his room. But the officer, theoretically, has no knowledge of that. And although he was there the week before, you have no evidence from that which you can conclude that the officer should know there was a bottle up in the room, and somehow that is supposed to be the constitutional touchstone of whether or not he is to get a warrant.

He gets a warrant because time is cold. Everything is cold at this point in time. He has no right to invade our castles. We are still in this country, secure in [R.14:29] our own homes against any action of the State, unless there is some very, very serious exigent circumstances or hot pursuit or one of the other reasons. And that is not present here. Unfortunately--and also there is a serious question about what the officer testified to and what Jablonic testified to. Jablonic didn't smell any alcohol. Jablonic didn't tell him he thought he was intoxicated. The officer came to that conclusion from what he said. Jablonic said he stood outside his window and smelled no odor of intoxicants. He is relying solely on

his gait and his slurring, period.

THE COURT: And his driving.

MR. SIMONSON: And--and some driving--erratic driving. There could be a lot of reasons for all those things. Now, to add intoxication, we have to have some evidence of alcohol. And at the time the officer left the scene, he had no evidence of any alcoholic consumption by this defendant. Usually in an arrest an officer will roll down the window and talk to the guy. He smells intoxicating liquor. That is the tip-off. That is what starts the wheels rolling. And if Jablonic had told the officer that "I think he was drunk because he smelled strongly of alcohol," that would be something. The officers had absolutely not one iota of evidence, according to

Jablonic's testimony, that there is any odor of alcohol upon this man. Now, for the officer to just say--

THE COURT: Perhaps your recollection of the testimony differs. My notes reflect that Mr. Jablonic pointed in the direction of Tree Lane; gave a description of the defendant and the fact that the defendant was intoxicated. That is from Officer Daley's testimony.

MR. SIMONSON: Well, that is self-serving. I am talking about Jablonic. He is the one we have to rely on, and he is the one Daley is relying upon. Now, is Daley saying Jablonic is a liar. Jablonic is the one that testified--very specifically, he was asked the question more than once; "Could you smell alcohol?" "No."

THE COURT: No, the question

is not whether or not he smelled alcohol. The question is whether or not he told Daley that the defendant was under the influence or was drunk.

MR. SIMONSON: And he did not. He told Daley--he says, "Well, I don't know." He told Daley that--as he expressed the testimony of the driving--the slurred speech and the gait.

THE COURT: Well, I also--my notes also reflect that he told--this is from Jablonic's testimony now, that he told the officer what had happened; that [R.14:31] he thought the defendant might be intoxicated, but that he might also be sick.

MR. SIMONSON: Sure. It could be any one of those things. That is probably--that is a lot of sup-

position. And moreover, Judge, the fact that time elapsed--the guy is gone--the guy is at home, and the officer should have known it is too late, as they do in the drug bust. The toilet has flushed, but in this instance he is in his own home, and he--and he has the opportunity to ingest alcohol while he was in his own home. It is just too darn late. Now, if I want to arrest him for something else, he has to go get a warrant. But to get a warrant for his arrest for drunk driving, it's a little bit remote. They lost him. The exigent circumstance situation was lost when this --before the officer even arrived upon the scene.

They could have gotten him--charged him with any number of other things, but not for intoxi-

cated driving, Judge--and then as to the consent issue. There is obviously a--the State has the burden. They didn't carry the burden. Our testimony, overwhelmingly, shows that the officer--a 16-year-old girl answering the door and simply the question was asked; "Is he here?" "Yes." And then they walk in. There was no questions asked, "We want to see him. We are officers. We came to [R.14:32] arrest him." Nothing was informed here. Furthermore, I don't think those stepdaughters have standing to give consent, even if they did--a teenager--a stepdaughter residing in his home. His wife could give consent before they go up, or he could give consent. But those stepdaughters don't have standing to give consent. No, I think under

the circumstances in this case the officers--the trail was lost. There is no evidence to preserve--or nothing too sufficient. The whole thing would have been a sham. They could, if they had wanted to, arrest him on another charge. They could have gone down and gotten a warrant and convinced the District Attorney to draft one. I don't think they could have. I think the DA would have said, "It is too late for drunken driving. We will charge him with something else." Because if they didn't, they would have to wake up the judge at that hour. It had to happen--say the officer--it's pretty close to 9:00. They could have called in and said he knew who it was. They could have called and had the DA draft a complaint, and

that complaint could have been drafted by the time they got down to the City-County building. They could have contacted within a two-hour period--they have two hours to do this. That two hours wouldn't have been up until pretty close to 10:30--11:00.

THE COURT: All right, the Court views the [R.14:33] critical time period here to be the period of time from which the defendant left the scene, until the officer undertook to apprehend him. Because the case was still very much alive while the defendant was still at the scene and driving about, stuck in the mud, and talking to Mr. Jablonic. So, the critical time period is not the point in time from which he ran off the road until the officer started after

him. It is from when Mr. Welsh left the scene until the officer started his apprehension. And there we have fairly strong testimony from Mr. Jablonic, although he doesn't recall exactly how long it was, he put five minutes as the outside time limit from the point in time until Mr. Welsh left, until Officer Daley started his apprehension. And Officer Daley indicates that he was only one or two minutes away when he received the call, and that he spent less than five minutes with Mr. Jablonic before going after the defendant. I think we also have to take into consideration that the officer had, in terms of probable cause, the prior week's experience with an alcohol-related incident with Mr. Welsh at that particular location. And the offi-

cer certainly is entitled to take that into account in weighing--in weighing the--his ability to arrest without a warrant on the evidence that he had. I think Mr. Jablonic --he can certainly can observe what may fairly be described as [R.14:34] probable cause that the defendant was under the influence of an intoxicant. And the question is the reasonableness of Officer Daley then entering the home shortly thereafter without a warrant to arrest the defendant.

I think although Mrs. Welsh, in response to leading questions, did indicate that she felt a half hour to 45 minutes had elapsed from the time the defendant got home, until the police arrived, that testimony is rather strongly impeached or inconsistent with her

earlier testimony that her husband arrived home around 9:00 p.m. and it's that 9:00 p.m. arrival time which strongly corroborates the State's case that it was shortly after the police arrived on the scene that the defendant would have just arrived at home, and then the police arrived shortly thereafter.

It is further corroborated, as Mr. Stewart indicated, by the fact that his clothes were still wet in his bedroom, and that there was apparently fresh muddy footprints leading up the stairs to the defendant's bedroom. The court would find, without having to address the consent issue, that: 1) The police did have probable cause to believe that the defendant had committed the offense of operating while under the influence; and further

find that due to the exigent circumstances of the need to take a breath sample from the defendant in conjunction with [R.14:35] their reasonably hot pursuit, that there was a valid reason for entry into the defendant's home without a warrant in order to apprehend the defendant. This contrasts rather strongly with the last case, which is the case--which is the case that held that the warrantless arrest in one's home is unconstitutional, in which case the police officers arrived at the defendant's home some 13 days after the defendant's involvement in the criminal transaction. Here it would appear that the officers arrived within 10 minutes of the defendant's leaving the scene.

And given the need to avoid

dissipation of alcohol within the body, the officer certainly had an exigency that would have made obtaining a warrant in this case unreasonable, in the Court's view. The defendant seems to argue both ways: 1) That the case was old and cold and that greater periods of time had elapsed on the one hand; and on the other hand, saying there is plenty of time left within the two-hour period in which to get a warrant. And the defendant really cannot argue it both ways. The Court would find both probable cause for arrest and a valid exception to the warrant requirement that require the Court to deny the defendant's motion to dismiss the complaint for lack of probable cause.

. . .

[R.13:53]

(Officer Daley recalled to the stand.)

FURTHER EXAMINATION BY MR. STEWART:

. . .

Q . . . Officer, we are talking about the contact with Mr. Welch on the 4th of April, 1978, in his residence; specifically, in his bedroom. Would you tell the Court, when you first entered the bedroom, what was Mr. Welch doing?

A He was lying in bed.

Q And was he asleep?

A No.

Q Did he say anything to you upon your entering the bedroom?

A No, I believe that we initiated the conversation by telling him why we were there and what we suspected.

Q What did you tell him?

A We told him that we suspected him

of being the driver in the incident off of Mineral Point Road, and that we suspected that he ran to the residence, and that we also [R.13:54] suspected he was under the influence of an intoxicant.

. . .

Q All right. After you informed him as to why you were there, he stated that he wasn't operating the car, is that right?

A Yes.

. . .

[R.13:55]

Q Did he make any mention whether or not he had anything to drink upon arrival at home on the evening of April 24, 1978?

A Yes, he made the statement he hadn't anything to drink. He had not had anything to drink prior to going to bed.

. . .

[R.13:57]

FURTHER EXAMINATION BY MR. SIMONSON:

Q Officer, you arrested the defendant up in the bedroom?

A Yes, sir.

Q Was that before or after he put his clothes on?

A After he put his pants on.

Q After you made inquiry of him whether or not he had been drinking, did you advise him of his Miranda warnings? [R.13:58]

A No, sir.

Q At the time that you walked in the room you said you initiated the conversation?

A Yes.

Q And you said something to the effect that--you said we were there because, "You are suspected of driving a car and also suspected of

intoxicated driving?"

A Yes, generally that was what was said.

Q At that point in time he was not free to go, was he?

A I don't believe he would have been, no.

Q So, really at that point in time, even though you didn't tell him he was under arrest, he was under arrest, was he not?

A Well, no, I don't believe that he was under arrest until we told him he was under arrest.

Q What question did you ask of him when he responded--allegedly responded, saying that he had not had anything to drink before going to bed?

A I don't believe we asked him anymore questions, other than whether or not he had anything to drink.

We were concerned as to whether or not, between the accident and the time that we contacted him, whether he had anything to drink. That was our main question.

. . .

[R.13:59]

Q But the reason you went into the house was to arrest him, true?.

. . .

A Yes.

Q So, technically, he was under arrest the moment you walked in the house?

A [R.13:60] No.

Q In the bedroom door?

A No, sir.

Q But it was your mental intent, when you went into the house, to have him arrested for drunken driving?

A Well, it was my mental intent to go in the house and determine if he

was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination.

Q And you did not disclose to him that it was your intent to arrest him if he had been drinking?

A I don't think that was stated in so many words.

Q And you never did give him his Miranda rights?

A Not up to that point, no.

. . .

FURTHER EXAMINATION BY MR. STEWART:

Q Officer, upon entry into this Welch residence, did you ever make any statements to anyone that you intended to arrest him, or that you

were there to investigate an accident?

A Again, I can't remember the specific language. However, [R.13:61] I conveyed to both the daughter--stepdaughter and the mother that we were there in regards to the accident at Mineral Point Road and Westfield, and that we strongly suspected that Mr. Welch had returned home, and that we wished to speak with him about the incident.

Q Okay.

THE COURT: Officer, you didn't offer the defendant anything in exchange for his answering these questions, I take it, did you?

A No.

THE COURT: Is it your testimony that the defendant offered--answered your questions freely and voluntarily?

A Yes, sir.

THE COURT: Was he under any duress or coercion, other than which may have been inherent in the situation?

A None whatsoever.

. . .

[R.14:41]

THE COURT: Is there a refusal in this matter?

MR. STEWART: There is a refusal. I would ask the Court whether or not there is a request for a refusal hearing.

THE COURT: Have you requested a refusal hearing?

. . .

[R.14:42]

MR. SIMONSON: June 19, 1978.

THE COURT: What is the reference to that date? [R.14:43]

MR. SIMONSON: Enclosed is my

client's request for implied consent hearing pursuant to 343.305(7)(c).

THE COURT: Was that hearing ever held?

MR. SIMONSON: Nope.

THE COURT: All right.

MR. SIMONSON: June 19, 1978, and that should be in the court file.

THE COURT: Well, that would have been in the old file, which is not before me.

MR. SIMONSON: I guess so. I don't think I have to renew it every time they re-did the complaint.

THE COURT: I think I would be inclined to agree that one request is all that would be required. Do you dispute that, Mr. Stewart.

MR. STEWART: I don't know the

answer to that.

THE COURT: Well, if you--we will schedule a refusal matter. If you think somehow it has been waived or you don't know if he is entitled to one, I will let you bring on a motion to that effect.

. . .

R.10:1
STATE OF WISCONSIN : CIRCUIT COURT :
FOR DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

VS. Case No. 80 CT 243

EDWARD G. WELSH,

Defendant.

DATE: September 5, 1980

BEFORE: Honorable MARK A. FRANKEL, Circuit Judge

. . .

PROCEEDINGS: Transcript of Reasonableness Hearing

. . .

R.10:4

RICHARD J. DALEY,

Called as a witness for the State, having been first duly sworn or affirmed, testified as follows:

. . .

R.10:11
CROSS-EXAMINATION BY MR. SIMONSON:

Q Officer, did you arrest the defendant without a warrant in his home?

A Yes.

Q And you arrested him at some period

of time following your receiving a report of an incident, is that right?

MR. STEWART: I would object to this line of questioning.

MR. SIMONSON: The hearing is predicated upon lawful arrest.

MR. STEWART: I disagree.

MR. SIMONSON: And the questions also go to my issue of reasonableness.

THE COURT: It doesn't say "lawful arrest". The statute just says, ". . .it was under arrest".

MR. SIMONSON: All judicial proceedings have to be founded upon lawful arrest.

THE COURT: That's not true -- that's "Archie Simonson on arrest," but that's not the laws according to this State. I would entertain an offer of proof from you concern-

ing the relevance as to reasonableness. It may well have some substantial bearing on that.

MR. SIMONSON: I think it -- I just have a couple of questions; let me get the record in.

. . . [R.10:12]

(The pending question was read by the reporter.)

A Yes.

Q You were present at a preliminary hearing in this court, were you not, at which the issue of your arrest was decided by the Court?

A I believe it was decided by the Court.

Q And do you recall the testimony being presented that there might have been a delay of ten minutes to forty-five minutes between my client's arrival at the house and your arrival at the house? [R.10:13]

A No, there could not have been forty-five minutes in between there.

Q I did not say "forty-five". There was testimony of between ten and forty-five minutes.

A I would have to refresh my recollection from the court -- I know it was approximately eleven minutes.

Q All right. The eleven-minute span we're talking about, that's from the time you arrived at the scene and talked to a witness and then proceeded down to my client's residence?

A No.

Q The eleven-minute span was between the time of the incident and your arrival at his house?

A Yes.

. . . [R.10:13]

Q And you admitted that my client was at the house at the time you were

there?

A Yes.

Q And he was there for a period of time before you got there?

A Yes.

Q And you admitted it's within the realm of possibility [R.10:14] that he would have had an opportunity to consume alcoholic beverages before you got there?

A Yes.

Q And the fact that he would have consumed alcoholic beverages at that time would have influenced any breathalyzer test he would have taken thereafter?

A Yes, it would have.

. . . [R.10:17]

EDWARD G. WELSH,

Called as a witness on his own behalf, previously having been sworn or affirmed, testified as follows:

DIRECT EXAMINATION BY MR. SIMONSON:

Q Do you remember the evening in question, Mr. Welsh?

A Yes.

Q And it is true that you arrived home sometime ahead of the officers?

A Right, yes.

Q All right, from your recall what period of time elapsed from the time you arrived at the house and the officers?

A I would say a half-hour to forty-five minutes.

Q Now, when you arrived home who was present in the house at the time?

A The girls and I came --

Q You say, "the girls" -- that includes your wife?

A Yes, she was home, yes.

Q You have her two daughters?

[R.10:18]

A Right.

Q And, tell us what you did when you came home.

A Came home, came in, went to the hallway, hung up my coat, went upstairs, and met my wife. She was upstairs and I went up and took my clothes off and put them in the bathroom and got into bed.

I had a pint of Canadian Club in there and I took a couple of good drinks of it and got into bed and started to go to sleep. It was cold out.

. . . [R.10:18]

Q Then what happened?

A I was woke up by three officers standing in my bedroom, in the doorway of the bedroom, you know.

Q Did you have any clothes on?

A No, I was under the blankets.

Q Now, the officers were there and what happened?

A Well, they started to come in, as far as I can remember, and one of them -- they said, "Get on your clothes and come downstairs. We're going to take you downtown".

Q In other words, you were arrested?

A Yes.

Q And they didn't have a warrant? [R.10:19]

A No.

Q And no permission to enter your house?

A No.

Q So, they took you downtown?

A First I asked them to leave the bedroom because I didn't have any clothes on, so I could get dressed, and two of them went downstairs and the other one stood on the stairway. So I got dressed and came down and they took me right on downtown, no "if's, and's or but's"

about it.

Q You said you took a couple belts from a --

A Pint.

Q Do you have any idea how much you consumed?

A Well, it was, I would judge, prett'near half of it and I use it for pain, too.

Q Well, I think it's fair to tell why you have pain.

A I have rheumatoid arthritis and I have to take a lot of medications for this chronic disease.

A Aren't you under some disability program because of that?

A Yes, Social Security Disability.

Q So they took you downtown and asked you to take a breathalyzer test?

A Right.

Q You didn't take it?

A No. I was going to and then the

one man -- I don't know [R.10:20] if he was an officer or what -- we got talking and I said, "Is this law in effect now?" and he said, "No, it wouldn't be for another month," and I said, "If that's the case I am not going to take it because I don't like machines".

. . .[R.10:21]

CROSS-EXAMINATION BY MR. STEWART:

Q What time did you consume the alcohol you testified to?

A You mean the last, when I was in the bedroom?

Q Yes.

A Well, I forgot just the time period there, but it was when I came home and got undressed. It's been so long I can't remember the time and that.

Q Do you remember what time the officers came into your bedroom?

A Well, like I said, it would be, I would judge, about thirty to forty minutes after I got home. I was about asleep.

Q How long did they stay in your bedroom? [R.10:22]

A Well, it wasn't very long. I asked them -- I didn't have any clothes on and I asked if they would leave, and I got up and got on my clothes.

A Then they took you downtown?

A Yes.

Q And how long after they arrived in your bedroom did they take you downtown?

A It was very soon, just a matter of how much time it took me to get dressed and I came downstairs and right on out, right to the car.

Q And soon after your arrival downtown they offered this breathalyzer test to you?

A Right.

. . . [R.10:24]

THE COURT: . . . [T]here may be a difference between the legality of it and the reasonableness of it. Those two issues may be somewhat different. In other words, it may be reasonable but it may be illegal because there may not have been an opportunity to get a warrant.

MR. SIMONSON: We already have a warrantless arrest, so it's unreasonable until the State proves to the contrary. You may want to ask the State's witnesses why they went in without a warrant to justify it.

THE COURT: I think I have already gotten that.

. . . [R.10:25]

THE COURT: Now for three of-

ficers to barge in with no reason on a wet, rainy night, confront the defendant in his bedroom and tell him to come down to the City-County building to take a breathalyzer test, if they have got no good reason to do that, or if the defendant feels that he's given the officers no good reason to do that, then, obviously, the request is a whole lot more unreasonable than if he's been out and acting in conformity with the actions that the State alleged in the earlier hearing.

MR. SIMONSON: Judge, that's not the point. He's entitled to the Constitutional process of a warrantless arrest as being unlawful automatically.

THE COURT: Unless it meets one of the exceptions.

. . . [R.10:26]

THE COURT: . . . The State has made its case as to what it's done in terms of arresting the defendant and taking him down to the station and reading him his rights. Now you have come along after the State has rested its case and raised the issue that the defendant's refusal was reasonable because the State on its part unreasonably arrested him in his bedroom in the middle of the night, as I understand it.

MR. SIMONSON: Your Honor, you're carrying it too far. He refused because he was arrested without a warrant.

THE COURT: So, you're taking a purely legal position?

MR. SIMONSON: Yes.

. . . [R.10:27]

MR. SIMONSON: He's entitled to that Fourth Amendment right whether he knows it or not.

THE COURT: What are you claiming, that it's an objective standard as to whether or not he's been illegally arrested or his subjective belief that he was illegally arrested, because those are two very different standards? If you are willing to concede that your premise is upon the reasonableness of this question on the objective standard that he was arrested without a warrant then you're absolutely correct. My whole line of inquiry was inappropriate.

MR. SIMONSON: That's the basis of it.

THE COURT: Then I will withhold that line of reasoning. I have already ruled that that was a

valid warrantless arrest.

MR. SIMONSON: Yes, you have, Judge.

THE COURT: And I think the Court, simply for the purposes of consistency, would have to maintain the same ruling. I apologize. I assumed you were predicating your argument as to this defendant's subjective belief as to what he felt to be a warrantless arrest, and I now have clarified, I think, that issue.

. . . [R.10:30]

THE COURT: . . . Mr. Welsh, let me ask whether you gave any explanation or reasons for not taking the breathalyzer to any of the arresting officers?

MR. SIMONSON: I object to that question because it's without foundation. The question should be

asked as to whether he was asked to give any explanation.

THE COURT: I will give you the opportunity to more fully explore that.

MR. SIMONSON: I don't want that question asked.

THE COURT: Were you asked to give any reasons for your failure to take the test?

THE WITNESS: Not as far as I can remember.

THE COURT: Did you offer any reasons?

THE WITNESS: No.

THE COURT: Why not?

MR. SIMONSON: I object to that question [R.10:31] because he doesn't have to answer "why not". It's not relevant.

THE COURT: It may or may not be relevant. I think there's a

problem here, Mr. Simonson, under the old statutory standard and that is that reasonableness -- unless you can give me some objective definition -- is a very subjective standard, is it not?

MR. SIMONSON: Yeah, but in this case common sense will --

THE COURT: I think common sense will also indicate where there is no criminal liability attached I think it would be reasonable to tell the officer why, the reason you're not --

MR. SIMONSON: Not under the Constitution.

THE COURT: This is a civil test. The Constitution has nothing to do with it. You are required to take the test unless there is a reasonable explanation as to why you don't take the test and you

have got civil consequences which will attach.

. . . [R.10:37]

THE COURT: Mr. Stewart, do you wish to offer your opinion on the reasonableness or unreasonableness of the defendant's refusal?

MR. STEWART: Yes. It's the State's position that the reasonableness for refusal is basically a procedural hearing. The State is required to do certain things in order to request a person to take a chemical test of his breath. Under the law and the mere nature of it you have implied consent.

When you get a driver's license you have agreed to consent to take the breathalyzer test and you have to have a reason or reasons for not taking that. My understanding of the law, although it is

under the old system, is that the only reasonable reason for not taking the test is a physical reason why you can't take it.

The fact that a person operating under the influence, or charged with that, in their mind thinks that either the police don't have probable cause or that the police [R.10:38] didn't see them operating a car, or the fact that they had some alcohol to drink -- that's irrelevant. That's not an issue in a reasonableness hearing. It's whether or not it was reasonable under the circumstances.

. . . [R.10:38]

I think the State has complied with all the requirements and the only reason the defendant would not take it is that it was unreasonable, and I would ask the Court to

rule it was an unreasonable refusal. I don't think the other issue of a warrantless arrest is relevant to that issue. [R.10:39]

THE COURT: I think if I were incorrect in my view of the law I would concede, in all likelihood, Mr. Simonson's point that the officers may not gather evidence or they may not pursue action against the defendant if it was a direct consequence of an unlawful arrest, but, as I indicated earlier, the Court is bound by its earlier ruling that that was a valid arrest.

And, I think Mr. Simonson certainly will have the right to challenge that on appeal if he appeals this matter, as well as the previous ruling should there be a conviction on the underlying charge.

. . .

[R.10:44]

THE COURT: The Court will make the following findings. It appears to be uncontested that the State has met its various responsibilities at this hearing on all the issues with respect to other than the question of reasonableness.

The defendant takes issue with the unreasonableness of his refusal on two grounds. One of those grounds is that subsequent to his driving he consumed approximately [R.10:45] one-half pint of whiskey and therefore believed that the test results would be unreliable. And, secondly, that his proceeding arrest was an invalid warrantless arrest.

With respect to the second issue raised by the defendant, as the Court has already ruled, the

Court believes that because of the exigencies of that circumstance and the type of instrument involved that that was not an illegal, warrantless arrrest but rather one that was justified due to the circumstances of that situation or one that was justified by the "hot pursuit" exception to the warrant requirement, and therefore would as a matter of law find that not to be a basis on which to find the defendant's refusal reasonable.

. . . [R.10:46]

Therefore, under all the circumstances, the Court would find the defendant's refusal to be unreasonable and would enter a suspension of the defendant's operating privileges for the statutorily provided period of 60 days.

No. 80-1686

STATE OF WISCONSIN : IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD WELSH,

Defendant-Appellant.

APPEAL from the order of the circuit court for Dane county: MARK A. FRANKEL, Judge. Vacated and remanded.

GARTZKE, P.J. Edward Welsh refused to take a breath test required by sec. 343.305(2), Stats., following a warrantless arrest in his home for violating sec. 346.63(1), Stats., operating a motor vehicle while under the influence of an intoxicant. A refusal hearing resulted in an order revoking his operating privilege from which defendant appeals. Prior to the refusal hearing,

defendant challenged the validity of his arrest. At the close of the evidentiary hearing, the trial court determined that it was unnecessary to decide whether the police entered defendant's home with consent, because exigent circumstances justified the arrest. We disagree and remand for findings on the consent issue.

The facts prior to the officer's arrival at defendant's home are undisputed. A witness testified that he saw defendant's car operate erratically and leave the road about 8:30 p.m., April 24, 1978. The witness stopped and defendant asked him for a ride home. When the witness refused, defendant walked away and the witness stayed at the scene. Another person called the police. About five minutes later Officer Daley arrived. The witness told Daley what he had seen and that he

thought defendant was possibly under the influence. Daley checked with the Motor Vehicle Department and learned that the car was registered to defendant. Daley and another officer arrived at defendant's home about 9:00 p.m. Daley testified he went to the house to arrest defendant and that he knew alcohol dissipates from the body with time.

Officer Daley testified that he and the other officer were admitted into the house, that defendant's wife advised Daley that defendant had stumbled into the house highly intoxicated and was upstairs in bed and that she told Daley she was concerned about the defendant's alcoholic problem and "something has to be done." Daley entered the upstairs bedroom where he found and arrested defendant.

Defendant's wife testified that she was upstairs when the police arrived

and that she told the officers only that her husband was upstairs. She did not know what happened at the door when the police knocked but related the version given to her by her daughters. The daughters' story, as related by Mrs. Welsh without objection, is perhaps ambiguous. Officer Daley testified that defendant's daughter answered the door, opened it, said, "He is upstairs," pointed to the stairway, and allowed the officers to pass. Daley testified that Mrs. Welsh came out of the kitchen and gave her consent to the officers to go upstairs.

The trial court found that the officers arrived at defendant's home within ten minutes after he left the scene of the accident and that exigent circumstances existed for entering defendant's home without a warrant to arrest him. In the trial court's view,

the exigency arose out of hot pursuit and the need to preserve evidence of intoxication which could be lost because alcohol is dissipated from the body with the passage of time.

In the absence of consent or exigent circumstances, entry into a home to make an arrest is unreasonable under the fourth amendment to the United States constitution unless done pursuant to a warrant. Steagald v. United States, ___ U.S. _____ (decided April 21, 1981); Payton v. New York, 445 U.S. 573, 583 (1980) ("Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" where no exigent circumstances).

What constitutes exigent circumstances or consent is a mixed question of fact and law. The factual basis for

the court's finding of exigent circumstances is not substantially disputed. The conclusion that exigency existed is a question of law. We are not bound by the trial court's conclusion of law. First Nat. Leasing Corp. v. Madison, 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977).

Exigent circumstances may permit officers to make a valid warrantless arrest of a suspect in his home. In Maryland Penitentiary v. Hayden, 387 U.S. 294 (12967), an armed robbery suspect fled into a house. The Supreme Court held that exigent circumstances justified a warrantless police entry five minutes later "to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them." 387 U.S. at 298. In United States v. Santana, 427 U.S. 38 (1976),

when police attempted to arrest a narcotics dealer in the doorway of her home, she retreated into the hallway and the officers pursued and arrested her. The Supreme Court held that the fact that the pursuit ended almost as soon as it began did not render it less than a "hot pursuit," and the realistic expectation that any delay would result in the destruction of evidence justified the warrantless entry and arrest. 427 U.S. at 43.

The ultimate test is whether the entry and arrest were reasonable. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37.

The need to search defendant's home

to preserve evidence was low compared to the interest invaded by the search. A violation of sec. 346.63(1), Stats., while serious, is a misdemeanor rather than a felony because it is not punishable by imprisonment in the Wisconsin state prison. Secs. 346.65(2) and (3) and 939.60, Stats. There is no evidence that injuries resulted from this single-car accident or that defendant was armed, violent or dangerous to himself or others after he left his car. Having arrived at his family home, whatever risk arose from his apparent intoxication was substantially reduced. There is no evidence that his wife or daughters needed help.

The privacy of the home is among our highest values. Invalidating a warrantless arrest after a warrantless entry, the Wisconsin Supreme Court emphasized that "one's home is entitled

to special dignity and sanctity." Laasch v. State, 84 Wis. 2d 578, 594, 267 N.W.2d 278, 282 (1978). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Payton, 445 U.S. at 589-90, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

The prosecution relies on State v. Bentley, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979), which held that where there was probable cause to believe that a driver was guilty of the intoxicated use of a motor vehicle, the fact that blood rapidly metabolizes alcohol was an exigency which justified taking a blood sample from the driver without his consent. Bentley relied on Schmerber v. California, 384 U.S. 757 (1966). Schmerber held that if delay

in obtaining a warrant threatens the destruction of evidence of a criminal offense because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, a warrant is unnecessary to take blood from the arrested person in a hospital. 384 U.S. at 770-71.

Bentley and Schmerber, supra, do not apply. The defendant in Bentley was charged with two counts of homicide and three counts of injury by intoxicated use of a motor vehicle, his home was not invaded without a warrant, and the exigency was sufficiently great in the view of the officers as to require forcibly taking a blood sample in a hospital. The defendant in Schmerber was involved in an accident in which he and a companion were injured and his home was not invaded. Welsh, on the other hand, was involved in a single-

car accident with no apparent injuries, his home was invaded and the officers only requested that he submit to a blood alcohol content test.

We hold that the warrantless entry and arrest of defendant in his home was unreasonable and violates the fourth and fourteenth amendments to the United States Constitution, unless entry was gained by consent.

A warrantless entry of a home is valid if permission to search is obtained from a person who possesses common authority or other sufficient relationship to the premises or property. United States v. Matlock, 415 U.S. 164, 172 (1974). Because consent is an undecided issue, the trial court's findings are inadequate. We remand for a finding by the trial court whether the officers entered the defendant's home

with permission.[1]

By the Court.--Order revoking defendant's Wisconsin driver's license is vacated and the matter is remanded for further findings consistent with this opinion.

Inclusion in the official reports is not recommended.

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[1]Appellant moved to strike as unsupported by the record a portion of the state's brief relating to the circumstances of the officers' entry. Because we have remanded for finding on the consent issue, it is premature for us to treat the issues raised by appellant's motion. The motion is denied for that reason.

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD G. WELSH,

Defendant-Appellant.

Supreme Court

WILLIAM G. CALLOW, J. This is a review of a May 26, 1981, decision of the court of appeals vacating an order of Dane County Circuit Judge Mark A. Frankel and remanding the matter to the circuit court for further proceedings. We reverse the decision of the court of appeals and affirm the order of the circuit court. The trial court revoked the defendant's motor vehicle operator's license for sixty days pursuant to his unreasonable refusal to submit to a breathalyzer test, as required by sec.

343.305(2)(a), Stats. 1977,[1] after having been issued a citation for the operation of a motor vehicle while under the influence of an intoxicant. Section 346.63(1), Stats. 1977.[2]

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[1]Section 343.305(2)(a), Stats. 1977 provides that

"Revocation of license on refusal to submit to tests . . . (2)(a) If a law enforcement officer has probable cause to believe that a person has violated s. 346.63(1) or a local ordinance in conformity therewith, the officer may request the person, prior to arrest and issuance of a citation, to take a preliminary breath test for the purpose specified under sub. (1), using a device approved by the department for the purpose. A person may refuse to take a preliminary breath test without being subject to revocation under sub. (9) if he or she consents, after arrest, to take a test under par. (b). Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance." Id.

[2] Section 346.63(1), Stats. 1977, provides that "[n]o person may drive or

The defendant challenges the officer's warrantless arrest in his residence as violating the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution.[3] The circuit court up-

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operate a motor vehicle while under the influence of an intoxicant or a controlled substance."

[3]The requirements contained in the Fourth Amendment of the Federal Constitution are binding against the states through the Fourteenth Amendment. Further, the provisions of the Fourth Amendment to the Federal Constitution are identical to those contained in Article I, sec. 11 of the Wisconsin Constitution. Both provide that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution Amendment IV; see Wisconsin Constitution, Article I, sec. 11.

held this warrantless arrest concluding that probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant, coupled with the existence of exigent circumstances, justified the officers' entry into the defendant's residence. The defendant appealed from this circuit court order, and a single judge of the court of appeals reversed the trial court, holding that, although the officers' warrantless arrest was unreasonable, thereby violating the Fourth and Fourteenth Amendments, the absence of a finding regarding a consensual entry necessitated remanding the case on that issue. We affirm the findings of the circuit court, holding that the co-existence of probable cause and exigent circumstances in this case justifies the warrantless arrest and obviates any further discussion concerning

the issue of consensual entry.

Prior to resolving the merits of this case, the state challenges the single-judge ruling of the court of appeals, contending that this should have been decided by a three-judge panel. Section 752.31(2), Stats. 1977, provides a categorization of cases subject to review by a single court of appeals judge, as opposed to a three-judge panel.[4]

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[4]Section 752.31(1),(2),(3), Stats. 1977 provides:

"752.31 Disposition of cases. (1) Except as otherwise provided in this section, the court of appeals shall sit in panels of 3 judges to dispose of cases on their merits.

"(2) Appeals to the court of appeals in the following types of cases shall be heard as specified in sub. (3):

"(a) Cases under ch. 199.

"(b) Municipal ordinance violation cases.

"(c) Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a).

"(d) Cases under ch. 51.

"(e) Cases under ch. 48.

"(f) Misdemeanors.

This dispute focuses on whether the defendant's unreasonable refusal to submit to a breathalyzer test pursuant to sec. 343.305(2)(a), Stats. 1977, falls within the purview of sec. 752.31(2)(c), Stats. 1977, authorizing a single-judge appeal in cases involving violations of traffic regulations. The state contends that the statutory penalty imposed for violation of a traffic regulation, as defined in sec. 345.20(1)(a), Stats. 1977, is a forfeiture. According to sec. 288.01, Stats. 1977, however, a forfeiture is

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"(3) A case specified under sub. (2) shall be heard by one court of appeals judge, except that any party on appeal may move in writing to the chief judge of the court of appeals that the case be heard by a 3-judge panel. The chief judge may grant or deny the request ex parte. Any appeal which is heard by a single court of appeals judge shall be heard in the county where the case or action originated if any party so requests."

defined as "any penalty, in money or goods" and the penalty pursuant to violating sec. 343.305, Stats. 1977 is a suspension of operating privileges. Consequently, the state argues that a suspension is not a forfeiture and therefore is not included within the parameters established in sec. 752.31(2), Stats. 1977. The defendant's timely notice of appeal conferring jurisdiction to the court of appeals vitiates the need to determine whether sec. 343.305(2)(a), Stats. 1977, is a traffic regulation. For if the court of appeals in its exercise of jurisdiction erroneously assigns this case to a single judge rather than to a panel, this alleged error, and we need not rule whether the court of appeals erred in this case, was waived when neither the state nor the defendant interposed a timely objection. Although

resolving this issue is unnecessary in the present case, it is instructive to note that sec. 752.31(2)(c), Stats., 1979-1980, was recently amended to include license suspension "cases under sec. 343.305," thereby expressly incorporating these cases within the parameters of sec. 752.31(2)(c), authorizing a single judge appeal. See sec. 2, ch. 152, Laws of 1981 (effective March 31, 1982).

The factual sequence underlying this dispute can be summarized through the testimony of the sole witness, Randy Jablonic. On the evening of April 24, 1978, Jablonic, a University of Wisconsin rowing coach, was driving alone in his truck. It was raining. He noticed that the driver of the automobile ahead of him was experiencing difficulty in operating his vehicle. In addition to the automobile's erratic speed, it was

moving from side to side, crossing into the opposing lane, barely missing a road sign, a median strip, and the oncoming traffic. The vehicle ultimately left the road entirely and drove into a field where it either became stuck or stalled.

Jablonic, concerned that the car might return to the road and fearful "[b]ecause I realized [he] would probably kill somebody" remained at the scene blocking the car to be certain that the car did not return to the highway. A motorist stopped and Jablonic requested her to alert the police. An officer arrived at the scene shortly thereafter.

Prior to the officer's arrival, however, the driver left the automobile in the field and approached Jablonic's truck. Jablonic testified that the driver asked him for a ride home but Jablonic replied that they should wait for assistance in removing or repairing the

car, rather than leaving it in the field. At this point the driver became alarmed and "broke into a very slurred conversation--'you wouldn't get your cops'--or something it was very insecure and not very controlled conversation." The driver then left Jablonic and headed back across the field abandoning the automobile and departing from the scene of the accident.

The police arrived "practically immediately upon, . . . his departure" and spoke with Jablonic who had remained at the scene. Jablonic responded to the officer's inquiry by describing his observations of the automobile and its driver. Jablonic told the officer that he believed that the driver "was very inebriated or very sick or not very much in possession of his faculties or ability to perform." When asked at trial what formed the basis of his opinion

that the defendant was inebriated, he testified ". . . the erratic motion of the car, and then the staggering and slurred speech that [the driver] exhibited when he was trying to talk" constituted the basis upon which he formed his conclusion that the driver was intoxicated. He further described the driver's walk as unsteady and unsure. He stated that when he spoke with the driver at the roadside he had remained in his truck. Consequently, he declared that he had "no opportunity to smell the [driver's] breath." Jablonic further testified that he commonly "see[s] many inebriated people, unfortunately," demonstrating his familiarity with the symptons [sic] of intoxication. Although Jablonic stated that "he [the driver] was very inebriated or very sick or not very much in possession of his faculties or ability to perform," this

statement, when considered within the context of the entire record, demonstrates the propriety of the trial judge's conclusion that Jablonic conveyed the definite impression that the driver was intoxicated. Jablonic's reference to illness was merely a remote possibility which provided an alternative, more charitable explanation--illness--to account for his erratic driving, unsteady movements, and slurred speech. The record supports the trial judge's ruling that the officer had probable cause to believe that the driver was intoxicated.

At the scene of the accident the officer ran a license check to determine the vehicle owner's identity. Although the officer could not conclude that the owner of the abandoned automobile was necessarily its driver, he did correctly recall that he wa involved in the arrest

of the owner in an alcohol-related disturbance within two weeks prior to this accident. The officer's recollection was sufficiently pertinent to provide additional evidence to support the existence of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence which was located near the scene of the accident. Attempting to confirm his belief that the defendant had, in fact, been driving his abandoned vehicle while under the influence of an intoxicant, the officer, arriving at the defendant's residence, asked the defendant's stepdaughter if the defendant was at home. The officer testified that she replied, he had "just stumbled in . . . ." "He is upstairs, and motioned that way--towards the stairs, allowing us to pass." Proceeding up the staircase, the officer

encountered the defendant's wife. He testified that she asked:

"'What is going on,'. . . again, we explained there had been an accident, . . . And we would like to speak with him because we thought he was probably under the influence of an intoxicant. And she, at that point, also gave her consent for us to go up, because she said, 'Yes, he is in bed. He just got into bed. And something has to be done,' referring to the fact that she recognized me from the earlier--I assumed she recognized me from the earlier case, and was, I think, saying that she was concerned about his alcoholic problem. And she indicated, 'Something has to be done,' and motioned us to the bedroom." (Emphasis added).

Affirming the trial court's dual finding of probable cause and exigent circumstances vitiates the need to remand this case to the circuit court on the issue of consensual entry, as was ordered by the court of appeals.

The issue in the present case addresses the delicate interrelationship between the individual's right to privacy and the governmental responsibility to enforce the law in a manner which

serves the public interest. To prevail in this case, the state must prove the co-existence of probable cause[5]

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[5]The arrest in the present case is statutorily authorized in sec. 345.22, Stats. 1977. This statute only requires probable or reasonable cause to effectuate a warrantless arrest.

Section 345.22, Stats. 1977, provides:

"345.22 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."

The "reasonable grounds to believe" language in sec. 345.22 is synonomous with the constitutional standard of probable cause. Johnson v. State, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977). Consequently, our reference to probable cause in the present case shall be interpreted as being used interchangeably with and meeting the statutory standard of "reasonable grounds to believe." Section 345.22, Stats. 1977.

Section 345.22 only requires probable cause in its authorization of a warrantless arrest for violation of a traffic regulation. The instant case, however, meets the statutory probable cause standard in addition to meeting the case law requirements of probable cause coupled with exigent circumstances.

and exigent circumstances, justifying the officer's conduct at the defendant's residence. We hold that there was ample evidence supporting the trial court's ruling that the officer's entry was justified on the basis of both probable cause and exigent circumstances. Entry to effect a warrantless arrest in a residence is subject to the limitations imposed by both the United States and the Wisconsin Constitutions. U.S. Const. amend. IV; Wis. Const. art. I, sec. 11. The individual's right to privacy in the home is a fundamental freedom protecting the individual from unreasonable governmental interference; however, this fundamental right is not absolute. It is subject to limited but well-established exceptions where the public interest requires that proper authorities may impinge upon the individual's right to privacy. In these

instances of compelling public need, the government bears the burden of proving that the public interest supersedes the individual's right to privacy. Consequently, to insure the validity of a warrantless arrest, the state must prove probable cause, coupled with exigent circumstances. E.g., Dunaway v. New York, 442 U.S. 200 (1979); Henry v. United States, 361 U.S. 98, 102 (1959); State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971); see Payton v. New York, 445 U.S. 573, 575, 583-88 (1980) [citing Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978)].[6]

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[6]Both Payton and Laasch are Fourth Amendment cases, providing fundamental support for our position in the present case. Payton v. New York, 445 U.S. 573 (1980); Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978). Although a cursory reading of Payton suggests that it is unconstitutional for police officers, having probable cause, to enter a private residence without a warrant, it is

This dual finding is subject to numerous and diverse interpretations. The common feature underlying all search and seizure interpretations, however, is the

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clearly distinguishable from the case at bar because, unlike the present case, Payton expressly disavows a finding of exigent circumstances. Payton states that,

"[a]lthough it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The [New York court] treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant, and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583 (footnote omitted) (emphasis added).

Likewise, the defendant's warrantless arrest in Laasch v. State occurred absent a showing of exigent circumstances. In Laasch, the issue before this Court was "whether, in the absence of any exigent circumstances, a police

reasonableness of the government's intrusion when considered within the context of the totality of the circumstances. See: State v. Cheers, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981); Bies v. State, 76 Wis. 2d 457, 468, 251 N.W.2d 461 (1977). The United States Supreme Court has addressed the concepts suggestive of analysis in determining the reasonableness of the governmnental

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officer may enter a suspect's home without consent in order to make a warrantless arrest." 84 Wis. 2d at 593 (emphasis added). Admittedly of less significance than the absence of exigency, the arresting officers in Laasch were arguably afforded ample time to obtain a warrant, as there was a thirteen-day interval between the defendant's offense and her arrest. Id. at 588-89.

Consequently, the time lapse and the absence of exigent circumstances in both Payton and Laasch limit their applicability to the present case. In this case, we hold that the existence of exigent circumstances contributes to our justification of Welsh's arrest.

interference with the individual's Fourth Amendment rights. "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown v. Texas, 443 U.S. 47, 50-51 (1979). Moreover "'[w]hether an inquiry is considered reasonable must depend upon the facts in each case and must turn on the application of what is essentially an indeterminate and flexible test.'" Bies v. State, 76 Wis. 2d at 466 [quoting Browne v. State, 24 Wis. 2d 491, 507 129 N.W.2d 175 (1964)]. Although the State must prove the existence of both probable cause and exigent circumstances, negating any implication of adherence to a mere balancing test, the progeny of

Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis. Exigent circumstances and particularly probable cause, are not susceptible to stringently mechanical definitions. Frequently, case law has offered guidance through example rather than by definition. Consequently, the particularities and peculiarities of a given case are considered in the context of reasonableness. Accordingly, thorough analysis seeks to ascertain whether the case, in its entirety, while meeting the dual standards of probable cause and exigency, veritably accommodates this context of reasonableness.

I. PROBABLE CAUSE

The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable pol-

ice officer to believe that the defendant probably committed the offense. The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense. The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. State v. Paszek, 50 Wis. 2d at 624-25.

In State v. Paszek, 50 Wis. 2d at 624-25, we described probable cause as follows:

"Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. Probable cause is

defined in Draper v. United States, supra, p. 313, as:

"'"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132."'" State v. Paszek, 50 Wis. 2d at 624-25 (citations omitted).

To effectuate a warrantless, nonconsensual entry into the residence, in addition to exigent circumstances the officers had to have probable cause to believe that the defendant had committed the offense of driving while under the influence of an intoxicant at the time they entered the home.

[1]

Examination of the record demonstrates the existence of probable cause, satisfying the first requisite of the

two-pronged test necessary to justify the officer's warrantless entry and arrest of the defendant. In this case, the officer had a substantial amount of reliable information, indicating to a reasonable police officer that the defendant had probably violated the statute prohibiting driving while under the influence of an intoxicant. See sec. 345.22; 346.63(1), Stats. 1977.

[2]

Arriving at the scene of the accident the officer was met by Jablonic, the sole witness to the driver's conduct. There is nothing in the record which challenges the reliability of either his observations or his statements to the officer. Adhering to the standard for reliability established in State v. Cheers, we held

"'"that a valid arrest without a warrant may be made solely by reason of

information communicated by a reliable informant. . . . A citizen who purports to be a victim of or to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested. . . . The rationale underlying this principle is that such a person, as the observer of criminal activity, acts openly in aid of law enforcement when he reports the crime to the police."'" 102 Wis. 2d at 395-96. (emphasis added) (emphasis in original omitted) [quoting State v. Paszek, 50 Wis. 2d at 631].

Consequently, Jablonic's information satisfies both prongs of the Cheers test for reliability.

In the Cheers case we discussed an additional "'factor to be considered in determining whether probable cause exists,'" namely, that the defendant's "conduct and retreat or 'flight' from the police officers' show of authority immediately prior to the time of his arrest certainly constitutes evidence of consciousness of guilt." State v. Cheers, 102 Wis. 2d at 391. The defendant's statements, as well as his imme-

diate retreat from the scene in fleeing to his home at the mention of police officers, clearly "constitutes evidence of consciousness of guilt" and is an additional factor buttressing our conclusion that the trial court properly found the existence of probable cause.

Jablonic told the officer at the scene of the accident that the officer had arrived "practically immediately upon [the driver's] departure." The officer's license check identified the owner of the vehicle. As we have noted, ownership does not necessarily indicate the driver's identity; however, the officer correctly recalled his involvement in the recent arrest of the owner in an alcohol-related dispute. Jablonic did not give a detailed description to the officer of the driver's physical features, but he did state that the driver was a man wearing wet clothing. This

information, coupled with Jablonic's observations of the defendant's erratic driving patterns and his personal conduct, further supports the trial court's holding of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence and was told that the defendant "had just stumbled in." While the officer, prior to his arrival at the house, had probable cause to believe that the defendant was the driver of the abandoned automobile, the defendant's stepdaughter's statement provided additional evidence in support of the proposition that the defendant was the driver because she said he had stumbled in only moments before the officer had arrived.

The word "stumbled" buttressed the witness's belief that the defendant was intoxicated. The fact that the defen-

dant had just returned home on this rainy night supports the officer's belief that the defendant was the driver of his just abandoned car. The officer believed that he had probable cause, declaring that he "thought [the driver] was probably under the influence of an intoxicant."

Although the defendant contends that the officer proceeded to the residence to determine whether he had sufficient evidence to establish probable cause to enter and arrest the defendant, we do not find this contention persuasive. The officer, acting upon Jablonic's observations, coupled with his own accurate recollection of his involvement in the arrest of the defendant in a recent alcohol-related disturbance, had probable cause when he proceeded to the residence. The officer's conversation with the defendant's stepdaughter before en-

tering the home provided further evidence establishing the existence of probable cause.

Scrutiny of the record, in its entirety, indicates that the officer had probable cause before he entered the defendant's residence. Although the officer may not have been absolutely certain that the defendant was driving while under the influence of an intoxicant, absolute certainty is not the standard employed in determining the existence of probable cause.

The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause. The officer testified that,

". . . it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my

intent to investigate it up to that point and make a determination."

The defendant argues that this statement demonstrates that the officer did not believe he had probable cause and was going to the defendant's bedroom solely to investigate. The officer's statement, when considered along with his declaration that the defendant "was probably under the influence of an intoxicant," demonstrates that the investigating statement is not being read by the defendant in the context of the entire record. The officer, correctly believing that he had probable cause, merely recognized that he was not absolutely positive that the defendant had been operating his automobile while under the influence of an intoxicant. The defendant could have been drinking after he returned to his home, thereby rendering the results of a blood alcohol

test meaningless. Moreover, if the defendant had been ill, rather than intoxicated, the officer would have changed his original conclusion on which he had predicated the existence of probable cause. Consequently, the officer's statement merely acknowledged that he was not absolutely certain that the defendant was driving while under the influence of an intoxicant, and prior to arresting the defendant, he was willing to reconsider his initial conclusion if necessary. A synthesis of these facts negates the possibility that the officer only had a mere suspicion that the defendant was driving while under the influence of an intoxicant in violation of sec. 346.63(1), Stats. 1977.

The foregoing evidence, when myopically parsed, may not individually support a finding of probable cause. When examined collectively, however, it un-

questionably indicates "that quantum of evidence which would lead a reasonable police oficer to believe that the defendant [driver] probably [violated the statute prohibiting driving while under the influence of an intoxicant]."[7] State v. Cheers, 102 Wis. 2d at 386; see Henry v. United States, supra; secs. 345.22 and 346.63(1), Stats. 1977. The evidence in this case clearly demonstrates that the trial court was correct in ruling that the state had met its burden.

In considering the governmental interest, it is appropriate to note that driving under the influence is a perva-

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[7]Consequently, Welsh meets the probable cause standard articulated in both the majority and dissenting opinions in State v. Cheers, 102 Wis. 2d 367, 386, 306 N.W.2d 676 (1981); Id. at 406, 408 (Abrahamson, J., dissenting).

sive problem of substantial proportion. In Wisconsin in 1981, there was a 5 per cent increase in drunken driving convictions from 1980.[8] Further, approximately 50 percent of all drivers killed in Wisconsin were driving while legally intoxicated.[9] The in-

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[8]Wisconsin Department of Transportation figures show that in 1981 there were 32,506 convictions for drunken driving. Drunken driving statistics covering years prior to 1981 have been published in annual reports entitled, Anderson, Wisconsin Accident Facts (prepared by the Traffic Accident Data Section of the Division of Motor Vehicles, Department of Transportation [hereinafter Wisconsin Accident Facts]).

In Wisconsin in 1980, there were 30,409 convictions for drunken driving. Wisconsin Accident Facts 16-17 (1980).

[9]In 1980, 583 drivers were killed. Of these drivers, 470 were tested for blood alcohol content, and 269 were found to be legally intoxicated, having a minimum blood alcohol content of .10 percent. Wisconsin Accident Facts 1 (1981). Similarly in 1978, 576 drivers were killed; while

creasing number of fatalities caused by drunken drivers has aroused state legislatures to adopt stricter penalties in the forms of substantial fines, imprisonment, and license suspensions to punish those who violate the laws prohibiting driving while under the influence of an intoxicant.[10]

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226 of the 448 tested were found to be legally intoxicated. Wisconsin Accident Facts 1 (1979).

[10]Sec. 967.055, Stats., created by Chapter 20, Laws of 1981, provides:

"Sec. 967.055 Dismissing or amending charges; operating a motor vehicle, intoxicant or controlled substance. (1) INTENT. The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, or a controlled substance or both.

"(2) DISMISSING OR AMENDING CHARGE. Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63(1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25 or s. 940.09 where the offense involved the

II. EXIGENT CIRCUMSTANCES

[3]

In addition to the existence of probable cause, accompanying proof of exigent circumstances must be shown in order to justify this warrantless entry. Proof of exigency vitiates the need for a warrant under those circumstances when obtaining a warrant could frustrate the arrest. An analysis of the facts demonstrates that, in this

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use of a vehicle or an improper refusal under s. 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant or both."

See Hammer, The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving, 55 Wis. B. Bull. 9 (April, 1982); e.g., sec. 346.63 (1), Stats., repealed and

case, exigent circumstances justified this officer's warrantless entry to effect the arrest of the defendant.

Frequently, proof that the officer is in hot pursuit of the suspect constitutes exigency. The hot pursuit doctrine evolved to encompass situations where time was of the essence. In other words, when requiring the police to obtain a warrant would constitute undue delay, the hot pursuit doctrine is applicable. In this case, time was of the essence. The inherent nature of the offense demanded the suspect's immediate apprehension to accommodate the dictates of the blood alcohol test statute. Sec-

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recreated by Chapter 20, Laws of 1981; sec. 346.65 (2), Stats., repealed and recreated by Chapter 20, Laws of 1981; see also Hammer, The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving, 55 Wis. B. Bull. 15, 17 (May, 1982).

tion 343.305(2)(a), Stats. 1977. In order for the officer to enforce the statutory requisites, the situation demanded his immediate search for and pursuit of the suspect.

The defendant, fearful of the officer's impending arrival and perhaps recognizing the possibility of being requested to submit to a blood alcohol test, left the scene of the accident upon discovering that the officer had been summoned. Fleeing to his home, in an attempt to avoid a confrontation with the officer, the defendant's hasty departure resulted in the abandonment of his car. If the officer had retreated and sought to obtain a warrant, rather than immediately pursuing and arresting the suspect, the requirements of the blood alcohol statutes would have been frustrated.

The imminent threat to safety doc-

trine also constitutes exigent circumstances. The sole purpose of the blood alcohol test is to facilitate prosecution of those driving while under the influence of an intoxicant. See sec. 343.305(2)(a) and 346.63(1), Stats. 1977. Further, sec. 345.24, Stats. 1977, provides that a person arrested for driving while under the influence of an intoxicant "may not be released until four hours have elapsed."[11] This

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[11]Section 345.24, Stats. 1977, provides in its entirety:

""345.24 Officer's action after arrest for driving under influence of intoxicant. A person arrested under s. 346.63 or an ordinance in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be released until 4 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305(2)(b) shows that there is .05% or less by weight of alcohol in the person's blood, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest."

severe treatment is dramatic evidence of the legislature's intent and recognition of the need to protect the public from drunken drivers. Undoubtedly, this provision was enacted to prevent drunken drivers from returning to the road while intoxicated. Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level, equal to or less than .05 percent. Restraining those drivers who pose a danger to themselves and the public for the four-hour statutory period constitutes a preventive measure, designed to promote public safety.

The officer concluded that he had probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant. Accordingly, the situation

demanded the officer's prompt attempt to locate the defendant. An arrest would prevent the driver from returning to his, or another automobile, where he could have continued to drive in his current state, posing a danger to himself and the public. Consequently, the nature of this offense, coupled with the potential threat to the public safety, satisfied the exigent circumstances test pursuant to the imminent threat to safety doctrine.

An equally persuasive argument is the probable destruction of evidence. This is a model case demonstrating the urgency involved in arresting the suspect in order to preserve evidence of the statutory violation. "Sometimes the nature of the evidence will be such that it will soon disappear of its own accord." 2 W. LaFave, Search and Seizure, sec. 6.5 at 448 (1978). "Blood rapidly

metabolizes alcohol after a person ceases drinking; thus creating an exigent situation." State v. Bentley, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979). Without an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of the defendant's alleged violation of sec. 346.63(1), Stats. 1977, would be destroyed. See sec. 343.305(2)(a), Stats. 1977. Accordingly, the facts of this case adhere to the presumption favoring warrantless arrests which are a result "of an ongoing investigation in the field," rather than an arrest that had been planned. W. LaFave, supra, sec. 6.1 at 391.[12]

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[12]Professor LaFave, a preeminent authority on the Fourth Amendment, distinguished a finding of exigency in cases involving planned arrests as opposed to those relating to an ongoing

In summary, we conclude that this situation did not afford the officer ample time in which to obtain a warrant. Further, the record demonstrates that the officer's conduct was reasonable within the context of the surrounding circumstances. Accordingly, we affirm the circuit court's holding, finding the existence of both probable cause and exigent circumstances in the present case.

By the Court.--The decision of the court of appeals is reversed.

CECI, J., took no part.

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investigation in the field:

"A 'planned' arrest is one which is made after a criminal investigation has been fully completed at another location and the police make a deliberate decision to go to a certain place, either the arrestee's home or some other premises where he is believed to be, in order to take him into

SHIRLEY S. ABRAHAMSON, J. (dissenting). As a result of the decision in this case, if a witness reports to the police that:

(1) a few moments ago, on this dark, rainy night he saw a car being driven

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custody. . . . Courts have understandably been reluctant to accept police claims of exigent circumstances in these situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained." W. LaFave, supra, sec. 6.1 at 391.

"On the other hand, when the occasion for arrest arises while the police are already out in the field investigating the prior or ongoing conduct which is the basis for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant. Here, the presumption should be in favor of a warrantless arrest rather than against it, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it." Id. at 392 (emphasis added) (footnote omitted).

erratically into a field;

(2) he observed and spoke with the driver of the car but does not know the name of the driver;

(3) the driver staggered and had slurred speech but that the witness had no opportunity to smell any alcohol on the driver's breath;

(4) the driver was either very inebriated or very sick; and

(5) there was no damage to any person or any property;

then the police officers, relying on a statute allowing an officer to arrest a person without a warrant for violating a civil traffic regulation (a civil, not a criminal offense) committed outside his presence, after checking to find that the title to the car is in your name, may, without your consent and without having a search warrant or arrest warrant issued by a judicial officer:

(1) go to your home at night;

(2) enter your home;

(3) climb the stairs to your second-floor bedroom;

(4) look around your bedroom to see if the clothes you took off match the description of the clothes worn by the driver of the car; and

(5) ask you, as you lie naked in your bed, to get out of bed so that the officers can determine whether you are intoxicated.

I dissent because I conclude that this warrantless invasion into your privacy in your home to investigate whether you violated a civil traffic statute contravenes sec. 11, Art. I, of the Wisconsin constitution and the fourth amendment to the federal constitution which guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects

against unreasonable searches and seizures. . . ."

The essence of the fourth amendment is that a judicial officer with the power to issue a warrant, not a policeman or government agent, decides whether the government can enter your home without your consent. As Justice Jackson so eloquently stated:

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Johnson v. United States, 333 U.S. 10, 14 (1948).

In a free society a warrant provides fourth amendment protection (1) by substituting the judgment of a judicial

officer for that of the police officer; (2) by preventing hindsight from coloring the determination of probable cause; and (3) by providing the person subject to the arrest with assurance that the police officer is acting within lawful authority. United States v. Martinez-Fuerte, 428 U.S. 543, 565-66 (1976). Under our constitution a warrantless arrest is unreasonable except in a few "jealously and carefully drawn" exceptional circumstances. Jones v. United States, 357 U.S. 493, 499 (1958).

In our country a warrantless entry into a home by a police officer is presumed unreasonable, because our society recognizes the special sanctity of the home. In Payton v. New York, 445 U.S. 573, 585-86 (1980), the United States Supreme Court clearly proclaimed that the "'physical entry of the home is the

chief evil against which the wording of the Fourth Amendment is directed,'" and that "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." It is only when "exigencies of the situation . . . make warrantless entry imperative" that warrantless entry into a person's home may be condoned. Laasch v. State, 84 Wis. 2d 587, 594, 267 N.W.2d 278 (1978). (Emphasis added.)

I dissent because I conclude that the warrantless intrusion into the defendant's home in the instant case is unconstitutional. First, I have grave doubts as to the constitutionality of sec. 345.22, Stats. 1977, authorizing a warrantless arrest for violation of a civil traffic offense committed outside the officer's presence. Absent sec.

345.22 the officer has no statutory or common law authority to arrest the defendant without a warrant. Second, assuming arguendo that a police officer has authority to arrest the defendant without a warrant for violation of a civil traffic offense committed outside the officer's presence if the officer had reasonable grounds to believe that the person violated a traffic regulation, the facts in this record do not support the majority's conclusion that the officer had probable cause to believe that the defendant committed the civil offense of operating a motor vehicle while intoxicated. Third, the facts do not justify the legal conclusion that the circumstances were exigent, making the warrantless entry into the defendant's home "imperative." Laasch v. State, supra, 84 Wis. 2d at 594.

Arrest for a Civil Offense. In contrast to the cases cited and relied upon by the majority to justify a warrantless entry into the defendant's home, this case does not involve a warrantless arrest for a felony. This case does not involve a warrantless arrest for a misdemeanor. This case does not even involve a warrantless arrest for the violation of a civil traffic statute committed outside the presence of an officer. This case involves a warrantless arrest for the violation of a civil traffic statute committed outside the presence of an officer.

The majority concludes that the officer's power to arrest is predicated on sec. 345.22, Stats. 1977, which states:

"345.22 Authority to arrest without a warrant. A person may be arrest-

ed without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."[1]

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[1]Both the defendant and the state initially treated this case as if the defendant was accused of violating a criminal statute and not a civil statute. The court of appeals decision stated that the case involved a misdemeanor yet there is no proof in the record that the defendant was involved in a crime. A first violation of sec. 346.63(1) is a civil forfeiture; a second or subsequent violation within the statutory time period is a crime. Sec. 346.65(2)(a)1, 2. The state in its briefs referred to the officer's power to arrest under sec. 968.07(1)(d), Stats. 1979-80, the criminal arrest statute. For other arrest provisions see sec. 62.09(13) and ch. 818, Stats. 1979-80.

When the defendant made the point that the offense here is civil, the state agreed that there is no indication that the offense is criminal. The state in its final brief argues that because the defendant did not raise the

Sec. 345.22 is a departure from the common law doctrine of arrest and from the long-standing rules of arrest in Wisconsin. The statute was enacted in 1971. The longstanding Wisconsin rules of arrest allowed an officer to make a warrantless arrest if the officer had probable cause to believe the person was committing or had committed a felony or to believe the person was committing or had committed a misdemeanor or an ordinance violation. The officer could not, however, make a warrantless arrest if the misdemeanor or ordinance violation was not committed

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question of whether the offense here indeed was a crime, that issue has been waived. I conclude that, regardless of the issue of waiver, the validity of sec. 345.22 is an important issue for this case and law enforcement, and we should under our discretionary powers reach it.

in the officer's presence unless other factors existed. Sec. 954.03, Stats. 1967. The common law, in contrast to the Wisconsin law, was more restrictive as to the officer's power to make a warrantless arrest for a misdemeanor. At common law the arrest was permissible only if the misdemeanor was committed in the presence of the officer and constituted a breach of the peace. State v. Smith, 50 Wis. 2d 460, 469, 472, 184 N.W.2d 889 (1971).

The validity of sec. 345.22, which authorizes a warrantless arrest for violation of a civil statute when the violation was committed outside the presence of the officer cannot be assumed. The constitutionality of a warrantless arrest for a felony committed outside the presence of an officer was not settled until 1976, and then by a divided United States Supreme Court.

In United States v. Watson, 423 U.S. 411 (1976), the Court declared constitutional a daytime warrantless arrest in a public place for a felony committed outside the presence of the officer. The Court upheld the warrantless felony arrest in that case, reasoning that such an arrest is based on accepted common law doctrine of arrest and that if felony arrests were permissible only with a warrant or only in exigent circumstances effective criminal law enforcement would be significantly handicapped. The reasoning of the Watson case cannot be applied to uphold sec. 345.22. I cannot find that the common law allowed a warrantless arrest for the violation of a civil statute committed outside the presence of an officer. The police apparently have the authority to issue a traffic citation to a person who violated a traffic

law ordering the person to present himself at court at a certain time. If we conclude that the police officer must get a warrant to arrest such a person, the effective enforcement of the traffic law will not be significantly handicapped and the constitutional protection of the sanctity of the home will be enhanced.

I have found no cases, and the majority cites none, upholding a warrantless arrest, either in a public place or in a home, for a civil traffic offense committed outside the presence of the officer. All the cases and commentary cited by the majority address the question of the validity of an arrest for a violation of a criminal statute. In Camara v. Municipal Court, 387 U.S. 523, 540 (1967), the Court concluded that in the absence of compelling urgency a warrantless administrative pub-

lic health search of a home violates the fourteenth amendment. Neither the defendant nor the state discusses the question of the validity of sec. 345.22. Because the validity of sec. 345.22 is of significance to traffic law enforcement in general, I would ask the parties for further briefing on this question.

At this stage, however, I wish to express my doubts about the constitutionality of sec. 345.22, Stats. 1977, to the extent that it authorizes a warrantless arrest on probable cause for a civil traffic offense committed outside the presence of an officer. Requiring a warrant in civil traffic cases would protect the privacy of the individual guaranteed by the constitution and would not unduly burden law enforcement. If there are exceptions to the warrant requirement in civil traffic

cases, these have to be defined.

Assuming arguendo that the law applicable to warrantless felony arrests can be applied without change to warrantless arrests for civil traffic offenses committed outside the presence of a police officer, I conclude there was no probable cause or exigent circumstances.

Probable Cause. In reviewing the decision of the circuit court as to probable cause, this court will not overturn findings of fact unless against the great weight and clear preponderance of the evidence, but this court will independently examine the record to make its own determination of the legal question, namely, whether the constitutional requirement of probable cause is satisfied.

The circuit court in this case stated its decision from the bench.

The circuit court merely concluded that "the police did have probable cause to believe that the defendant had committed the offense of operating while under the influence." The circuit court did not make any findings of fact, did not make any analysis or summary of the evidence, and did not analyze the legal principles it used to reach its legal conclusion.

There are disputed facts in this case and the credibility of witnesses is at issue. Generally where the circuit court does not expressly make a finding necessary to support its legal conclusion, this court can assume that the circuit court made the finding in the way that supports its decision. Sohns v. Jensen, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). See also State v. Fillyaw, 104 Wis. 2d 700, 727-28, 312 N.W.2d 795 (1981) (Abrahamson, J.,

concurring). The majority's de novo review of the record must therefore be to determine the legal significance of the facts, not to decide the disputed facts and the credibility of witnesses.

When an arrest is made without a warrant the state bears the burden of proving the existence of probable cause. Leroux v. State, 58 Wis. 2d 671, 682, 207 N.W.2d 589 (1973). In the case at bar a determination by this court of the legal question of probable cause to believe that the defendant was driving while under the influence of an intoxicant turns on three pieces of information known to the officer making the arrest.

The first piece of information is the ownership of the car. This information is relied upon to establish that it is probable that the defendant was the driver of the car. Jablonic did

not describe the driver sufficiently for the officer to be able to identify the defendant as the driver. The officer had to reason that because the defendant was the owner of the car, he was probably the driver.

The second piece of information on which the determination of probable cause turns is that the defendant had been arrested previously in an alcohol-related disturbance. This information is relied upon to establish that the defendant was probably intoxicated. There is no indication in the record as to the nature of the alcohol-related disturbance; as to whom, if anyone, was intoxicated during this alcohol-related disturbance; as to the nature of the offense for which the defendant was previously arrested; whether there was any finding of probable cause for the arrest; or whether

any further civil or criminal proceedings against the defendant resulted from the arrest. The majority opinion says that the officer "did correctly recall" the arrest. (Emphasis added.) Supra, p. 325. See also supra, pp. 331, 332 where the majority states that the officer's recollection was accurate and correct. There is nothing in the record which indicates whether the officer's recollection about the previous arrest of the defendant is correct or incorrect.

I need not reach the question of when a defendant's previous arrest may be relevant and probative in determining probable cause. In the case at bar the officer's testimony as to the defendant's prior arrest is so sketchy and subject to so many interpretations that neither the circuit court nor this court can use the information about the

arrest to help form its independent determination whether the facts in the possession of the officer are as a matter of law sufficient to constitute probable cause.

The third, and most important, and perhaps the only piece of information on which the determination of probable cause turns, is Jablonic's statement to the officer. This information is relied upon to establish that the driver was probably intoxicated. The critical element in determining probable cause in the case at bar is whether the information which Jablonic, a reliable eyewitness, gave the police officer is sufficient to lead a reasonable police officer to believe that the driver was probably driving under the influence of an intoxicant.

Jablonic, the only person available with first-hand information about the

driver and his driving, testified that the driver was walking and speaking with difficulty and that he was either intoxicated or sick. Even though, as he testified, he was familiar with the signs of intoxication, Jablonic had good reason to be uncertain. The weather was bad, and visibility was poor. Further, Jablonic was not able to verify or discard his intoxication theory because he did not have the opportunity to smell any alcohol when the driver spoke to him and asked him for a ride. I acknowledge that the mere fact that an innocent explanation for the driver's conduct, that is, illness, may be imagined is not enough to defeat probable cause. 1 LaFave, Search and Seizure, sec. 3.2(e), pp. 483-84 (1978). But in this case the innocent explanation for the driver's conduct is not imagined; the innocent explanation

is provided by the only witness, and it is provided as a real possibility.[2] The majority, without ex-

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[2]Jablonic's entire testimony as to what he told the police officer concerning the driver's condition is as follows:

"Q. What did you tell the officer? Did you give the officer a description of the individual you had been talking to?

"A. I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to perform. And it was my feeling that he had taken off across the field.

"Q. What did you base your opinion on that he was inebriated?

"A. Well, first of all the erratic motion of the car, and then the staggering and slurred speech that he exhibited when he was trying to talk to me.

"Q. You have seen people or persons under the influence of an intoxicant before?

"A. Working at the University, it's a common--very common to see many inebriated people, unfortunately."

Jablonic described the driver as follows:

"Q. Did you notice anything about this person?

"A. They had a kind of a wet

planation and without any basis in the record, characterizes Jablonic's reference to illness as "merely a remote possibility which provided an alternative, more charitable explanation." Supra, p. 325.

The officer's testimony of what Jablonic told him is inconsistent with Jablonic's testimony. The officer testified that Jablonic had a definite

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leather jacket on or something that looked like a reddish-brown jacket, as what I can recall. It was evening. It was raining and wet. It might have been even a sportcoat that was just wet. And they stood by the window of the car, which I rolled down.

"Q. All right, did you have an opportunity to observe the way this person walked?

"A. It was very unsteady and unsure. And--the person that just wasn't very well would walk like that.

"Q. And did you--did this person get close enough to you that you could observe his breath?

"A. No. They remained outside the vehicle. I did roll down the window. I conversed with the person. But there was no opportunity to smell his breath."

opinion that the driver was intoxicated.[3] Other aspects of the officer's testimony, however, indicate that Jablonic had conveyed his uncertainty to the officer as to whether or not the driver was intoxicated. The officer's own testimony indicates that he went to the defendant's residence to investigate the defendant's condition, not to arrest the defendant. Thus in response to the question as to what was the officer's "mental intent, when you went into the house, to have him arrested for drunken driving," the officer answered,

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[3]Officer Daley testified as to his conversation with Jablonic as follows:

"Q. Do you recall whether or not he [Jablonic] said anything about this individual being under the influence?

"A. Yes, he had a definite opinion about that.

"Q. What did he tell you?

"A. He said the man was very obviously intoxicated."

> "Well, it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

It was only after making the warrantless entry into the home, observing the defendant "wringing wet," seeing in the bedroom defendant's clothes which matched the clothes Jablonic described and smelling alcohol that the officer himself concluded he had sufficient information to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant and decided to arrest the defendant.

Although the majority states that the circuit court reached "the conclusion that Jablonic conveyed the defi-

nite impression that the driver was intoxicated" (supra, p. 324), nowhere in the record did the circuit court state such a conclusion or even hint it reached such a conclusion. The circuit court's only reference to Jablonic's testimony is a reference by the circuit court to its notes which quote Jablonic as telling the officer that the driver was either sick or intoxicated. if any conclusion of the circuit might be gleaned from the record as to the circuit court's finding of credibility as to Jablonic's or the officer's version of what Jablonic told the officer, and I do not know that any can be, it is that the circuit court relying on its notes concluded that Jablonic offered two explanations to the police officer for the driver's conduct--intoxication and illness. The most appropriate construction of the record is, however,

that the circuit court concluded that it need not decide which witness to believe because whichever witness it believed the evidence was adequate to establish probable cause.

The majority seeks to bolster its conclusion that the officer had probable cause by relying on the officer's testimony as to what the daughter and the wife said when the officer entered the house. The daughter was not present to testify. The wife, without objection, related the daughter's version of what had happened, and the wife's testimony contradicts the officer's. The circuit court expressly avoided having to determine whose testimony it believed, the wife's or the officer's, and therefore the majority cannot use the officer's disputed testimony to bolster its conclusion.

Although the subjective conclusions

of the police officer concerning the existence of or lack of existence of probable cause do not bind a court, the officer's apparent decision in the case at bar that the eyewitness furnished information sufficient to warrant further investigation but did not furnish information sufficient to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant has some weight in this court's independent determination of whether the information relayed to the officer was sufficient. Instead of saying that he intended to arrest the defendant but that he would have refrained from making the arrest if he found that the defendant was not intoxicated, the officer concluded on the record that it was his "intent to investigate . . . and make a determination." The major-

ity cannot, try as it will, change the officer's words.

On the basis of the record in this case, I conclude that the state did not present sufficient facts to prove that information in the officer's possession was sufficient to satisfy the constitutional standard of probable cause. I conclude that when the officers entered the residence, they could only suspect that the defendant may have been the driver and that the driver may have been under the influence of an intoxicant. Reasonable suspicion (that is, ample factual justification falling short of what is required to support arrest or search) may be sufficient to justify further investigation, and in some situations, to justify a stop but it is not sufficient to justify a warrantless arrest. Brown v. Texas, 443 U.S. 47, 51 (1979); Terry v. Ohio, 392

U.S. 1, 22 (1968); Wong Sun v. United States, 371 U.S. 471, 479 (1963); State v. Cheers, 102 Wis. 2d 367, 386-87, 306 N.W.2d 676 (1981); Bies v. State, 76 Wis. 2d 457, 465-66, 251 N.W.2d 461 (1977).

The majority opinion, in the section entitled probable cause, discusses the government's interest in eradicating drunk driving. Supra, pp. 333-335. The relevance of this discussion is not readily apparent. First, granting the police the power that the majority does in this case "does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment." Delaware v. Prouse, 440 U.S. 648, 660 (1979). The contribution to highway safety of allowing warrantless arrests in the home of persons who are reported to have driven erratically and who are

described as drunk or sick and who caused no damage to property or person is marginal at best.

Second, if the police officer had probable cause to make the arrest, the government's interest and the seriousness of the offense are irrelevant. If the police officer did not have probable cause to arrest, the arrest is unconstitutional and the government's interest and the relative seriousness of the offense are irrelevant. If the majority's discussion of the government's interest is the majority's way of saying that the seriousness of the offense is a factor for the police and the courts to consider in determining probable cause, the majority is making a dramatic change in the law of probable cause and is establishing a balancing, sliding scale test that would be difficult for both police and courts to

comprehend and apply. 1 LaFave, Search and Seizure, sec. 3.2(a), pp. 450-58 (1978).[4]

Exigent circumstances. Even if there is probable cause to believe the defendant has committed a felony, a warrant is required to enter a home unless exceptional circumstances are

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[4]In determining probable cause there is no balancing or weighing of the gravity of the public concerns served by the arrest and the severity of the interference with individual liberty. The balance has been made by adopting the requirement of probable cause. As the United States Supreme Court has said, "The requisite 'balance' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." Dunaway v. New York, 442 U.S. 200, 214 (1979).

The majority at one and the same time appears to negate and to inject a balancing test in determining probable cause. The majority says at supra, p. 329 that "although the State must prove the existence of both probable cause and exigent circumstances, negating any implication of adherence to a mere

present which justify a warrantless entry. United States v. Johnson, ___ U.S. ___ (June 21, 1982); Payton v. New York, 445 U.S. 573 (1980); Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978). Payton and Laasch, upon which

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balancing test, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis." (Emphasis supplied.) The progeny to which the majority refers are Brown v. Texas, 443 U.S. 47, 50-51 (1979), and Bies v. State, 76 Wis. 2d 457, 466, 251 N.W.2d 461 (1976) (quoting Browne v. State, 24 Wis. 2d 491, 507, 129 N.W.2d 175 (1964) cert. denied. 379 U.S. 1004). These cases involve an investigation or a stop which requires something less than probable cause. An investigation and a stop may be justified even if there is no probable cause as long as there is "mere 'reasonable suspicion.'" Dunaway v. New York, 442 U.S. 200, 211 (1979). Reasonableness in the probable cause context revolves around whether the officer has reasonable grounds to believe that the defendant probably committed a crime. Reasonableness in the context of an investigation or stop involves balancing the gravity of the state's interest and the nature of the

the majority relies, are authority only for the proposition that a warrantless arrest in a home may be permissible under exigent circumstances if the officer has probable cause to believe a felony has been committed. These cases are not authority for a rule that a warrantless arrest can be made in a home under exigent circumstances if the crime is a misdemeanor or if the offense is a civil traffic offense. The majority cannot assume that the Payton

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invasion of the privacy of the person. The majority's shifting back and forth between the balancing test justifying an investigation or stop and the concept of probable cause justifying a search or an arrest may very well explain why the majority reaches the conclusion it did in this case that the intrusion in the defendant's home and his arrest were constitutional.

The court of appeals used a balancing test in this case to determine exigency, not to determine probable cause. See note 5 infra.

and Laasch rule is automatically applicable to this case. The issue which must be decided, not assumed, is under what circumstances, if any, is a warrantless entry in a home at night to effect an arrest for violation of a civil statute constitutional? Does the government's interest in enforcing the civil law and collecting a forfeiture ever outweigh an individual's expectation of privacy in his or her home?

Even if I were to assume that the Payton-Laasch rule is automtically applicable to this civil forfeiture case, I conclude the record is not adequate to find exigent circumstances.

The exigent circumstances doctrine, like all exceptions to the warrant requirement, must be viewed as a narrow exception to the protections of the fourth amendment. In McDonald v. United States, 335 U.S. 451, 456

(1948), the Court said: "We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that cause imperative." (Emphasis added.) See also Laasch v. State, quoted supra at page 341 of this dissent.

Although the United States Supreme Court has on several occasions spoken of exigent circumstances, the Court has not clearly defined what are exigent circumstances or established standards to measure the existence of such exigent circumstances. In this case, the circuit court appeared to conclude that the exigency arose out of hot pursuit and the need to preserve evidence of intoxication. The majority, on the other hand, identifies three exigent circumstances, that is, three urgent

circumstances that make resort to the warrant process impracticable: (1) the need to prevent the offender's escape (hot pursuit); (2) the need to prevent physical harm to the offender and the public; and (3) the need to prevent the destruction of evidence.

The majority opinion does not establish standards by which the existence of the exigent circumstances are to be tested. For example, the majority does not explain whether the test for a valid warrantless entry under the exigent circumstances doctrine is a subjective one, an objective one, or both. In State v. Prober, 98 Wis. 2d 345, 365, 297 N.W.2d 1 (1980), the court adopted a two-step analysis (subjective and objective) for application of the emergency doctrine, an exception to the warrant requirement which is similar to the exigent circumstances

doctrine. Under Prober, the warrantless search is invalid unless the officer is actually motivated by the perceived emergency, that is, to render aid or assistance (subjective test). Second, "even though the requisite motivation is found to exist," the warrantless search is invalid unless a "reasonable person under the circumstances would have thought an emergency existed" (objective test).

If the Prober two-step analysis for the emergency doctrine is not applicable to the exigent circumstances doctrine the majority ought to tell us why.

This case cannot meet the Prober subjective test. The officer did not testify that he believed he had to arrest the defendant immediately in order to prevent the defendant from escaping or in order to protect the defendant or the public from the danger of the de-

fendant driving another automobile that night. The officer does refer to the fact that alcohol dissipates with the passage of time. But the officer said that his subjective motivation was to investigate immediately, to determine if the defendant was drunk. The officer did not testify that he believed he had to arrest the defendant immediately to preserve the evidence. He said he went into the house to determine whether the defendant was drunk and if so he would then attempt to preserve the evidence.

This case also cannot meet the Prober objective test of exigent circumstances.[5] The essence of the

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[5]In applying the objective standard, federal and state courts have, according to the commentators, taken one of two approaches in attempting to articulate the facts which bear on the

exigent circumstances doctrine is the degree of urgency to make the arrest or search created by the exigency and the amount of time it would take to obtain a warrant.

The warrantless entry in this case cannot be justified as necessary to

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determination of exigent circumstances: the checklist approach articulated in Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc) or the totality of the circumstances test. See Harbaugh and Faust, "Knock on Any Door"--Home Arrests after Payton and Steagald, 86 Dick. L. Rev. 191, 224-25 (1982); Donnino and Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Alb. L. Rev. 90 (1980); 2 LaFave, Search and Seizure, sec. 6.1, pp. 388-95 (1978).

Judge Gartzke, writing for the court of appeals, used a balancing test to determine whether the exigency justified the intrusion. He assumed that this case involved a misdemeanor and concluded that although there was urgency to avoid destruction of evidence, the urgency in this case was not sufficiently great to justify a warrantless arrest in the home. He noted that the "misdemeanor" in this case was not a grave offense. The defendant had not

prevent the defendant from escaping arrest or to prevent physical harm to the driver or to the public. The police had the defendant's name and address. There is nothing in the record to indicate that the police thought he would leave the jurisdiction or would not be available for arrest unless he was pursued and arrested immediately. The majority speculates,

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injured any person or property. The defendant's wife and daughter were in no danger. The defendant was in no danger; he was upstairs in bed. An intrusion by the police into a bedroom at night is a serious intrusion on privacy. Entry into the home is ordinarily afforded the most stringent fourth amendment protection. Judge Gartzke's approach of looking at the entire case and balancing the government's need for immediate police action and the defendant's interest in privacy in the home is interesting and worthy of discussion and consideration. It also seems to satisfy the majority's keen interest in balancing and reasonableness. Unfortunately the majority ignores the approach of the court of appeals.

without anything in the record supporting this speculation, that the defendant (whose car was in the field and who, as the police officers found out when they knocked on the door, was in bed) had to be arrested immediately to prevent him from driving another car. The "threat to safety" exception must be limited to situations where the officer has reasonable factual justification to believe the defendant intends to drive again. Without this limitation, in every case involving probable cause to believe that the person was driving under the influence, the police would be justified in making a warrantless entry into the home to arrest the person.

The threatened destruction or removal of evidence presents a more difficult issue of exigent circumstances. It is beyond question that alcohol

"disappears" over a period of time and that the evidence of intoxication will be destroyed by the passage of time. But neither the record nor the majority opinion describes the degree of urgency to make the arrest, that is, how long a time period may elapse before the alcohol has disappeared, and the amount of time it would take to obtain a warrant in the city of Madison at 9:30 at night.

Drugs can be flushed down a toilet in seconds. Money or bloody clothes can be burned within minutes. When we talk about "destruction" of the evidence of intoxication we are talking about hours.

Sec. 345.24, Stats. 1977, indicates that it may take up to four hours to allow an intoxicant's blood alcohol content to metabolize to a "safe" level. Sec. 885.235(3), Stats. 1977, states that chemical tests performed

within two hours of the event to be proved are given prima facie effect without expert testimony; tests performed more than two hours after the event to be proved are admissible as evidence if expert testimony establishes its probative value and prima facie effect. Thus police can perform the test more than two hours after the event and still have acceptable evidence to present in court. In State v. Bentley, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979), a blood sample was taken from the accused three and a half hours after the accident, and the results were apparently damaging to the accused's position. Sec. 885.235(3) was amended in 1982 to provide that samples taken within three hours are given prima facie effect without expert testimony; tests not taken within three hours after the event are admissible

only if expert testimony establishes their probative value and prima facie effect. See ch. 20, sec. 1816(c) and (e), ch. 184, sec. 5, Laws of 1981.

In this case the police zeroed in on the identity of the defendant in about one half hour after the event to be proved. It is up to the state to introduce evidence that resort to the warrant process was impracticable because the warrant and any test for intoxication would come too late. Yet the state introduced no such evidence. Nor are there scientific facts or facts relating to the practice in Dane County as to the issuance of warrants of which this court might take judicial notice to justify the conclusion that a reasonable officer might reasonably have believed that he had to preserve the evidence from destruction and had no time to get a warrant. Because the

state has not met its burden of showing that its warrantless entry was "imperative," I would hold that the circumstances were not exigent.

Accordingly, I would affirm the decision of the court of appeals and remand this case to the circuit court to determine the issue of consent.

To preserve the federal and state constitutional guarantees of the sanctity of the home against the knock on the door in the middle of the night by government officers who do not have a warrant issued by a judicial officer, I dissent.

I am authorized to state that Justice NATHAN S. HEFFERNAN joins this dissent.

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CASE NO. 82-5466

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT AND APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourth amendment as applicable to the states by virtue of the fourteenth amendment, which is quoted in the petition for writ of certiorari.

Section 345.22, Wis. Stats. (1977), which provides:

> **Authority to arrest without a warrant.** A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.

STATEMENT OF THE CASE

The respondent provides a statement of the case to summarize the developments of this case as it progressed through the state courts and to show that in the state courts the petitioner failed to raise the issue he has presented for review in this court.

The police made a warrantless arrest of the petitioner in his home for the offense of operating a motor vehicle while under the influence of an intoxicant. State v. Welsh, 108 Wis. 2d 319, 321, 321 N.W.2d 245 (1982); R-Ap. 103. The petitioner was charged with the misdemeanor offense of operating a motor vehicle while under the influence of an intoxicant. Upon

conviction, he faced a possible jail sentence of not less than five days nor more than one year and an additional fine of not more than $500.00. R-Ap. 150.

Because the petitioner refused to submit to a breathalyzer test after his arrest, a hearing was scheduled to determine whether the refusal was reasonable. Welsh, 108 Wis. 2d at 320, 322; R-Ap. 102, 104. At the reasonableness hearing, the petitioner claimed that his arrest was illegal. Deciding the issue in the context of the criminal charge, the Circuit Court for Dane County found that the arrest was legal because the police officer had probable cause to believe that the petitioner had committed the offense and exigent circumstances existed to justify the warrantless entry into the home.

The petitioner appealed to the Wisconsin Court of Appeals where both parties treated the case as one involving an arrest for a misdemeanor charge of operating a motor vehicle while intoxicated. In his brief in the Wisconsin Court of Appeals, the petitioner stated that he had been criminally charged. Wisconsin Court of Appeals brief of defendant-appellant, at 2; R-Ap. 235. As to the validity of the arrest, the petitioner argued that because the police did not possess probable cause and because no exigent circumstances existed, the arrest was invalid. Wisconsin Court of Appeals brief of defendant-appellant, at 6-8; R-Ap. 239-41. The petitioner contended that because the arrest was illegal, the trial court lacked personal jurisdiction. Wisconsin Court of Appeals brief of defendant-appellant, at 9; R-Ap. 242.

The State of Wisconsin argued in the Wisconsin Court of Appeals that the arrest was valid on the ground that the police officers possessed probable cause and exigent circumstances existed because, without an immediate arrest, evidence could have been lost or destroyed. Wisconsin Court of Appeals brief of plaintiff-respondent, at 4-7; R-Ap. 266-69.

In his reply brief, the petitioner again indicated that he had been charged with a misdemeanor and he argued that the circumstances were not exigent enough to justify the warrantless entry. Wisconsin Court of Appeals reply brief of defendant-appellant, at 3; R-Ap. 275.

In deciding the appeal in favor of the petitioner, the Wisconsin Court of Appeals treated the case as involving a misdemeanor arrest. Wisconsin v. Welsh, No. 80-1686 (Wis. Ct. App., May 26, 1981), at 5; R-Ap. 145.

The Wisconsin Supreme Court granted the state's petition to review the decision of the court of appeals. In the Wisconsin Supreme Court the state argued that the misdemeanor arrest was valid because it was based on the combination of probable cause and exigent circumstances. Wisconsin Supreme Court brief of plaintiff-respondent-petitioner; R-Ap. 170-89.

In his responding brief in the Wisconsin Supreme Court, the petitioner argued that the police did not have probable cause to believe that a misdemeanor had been committed because there was no showing that at the time of the arrest the police knew whether the petitioner had previously been convicted of operating a motor vehicle while intoxicated. Wisconsin Supreme Court brief of defendant-appellant, at 6; R-Ap. 212. The petitioner argued that, at best, the police only had probable cause to believe that he had committed a first offense for operating while intoxicated, the conviction for which carried a noncriminal forfeiture penalty. Wisconsin Supreme Court brief of defendant-appellant, at 6; R-Ap. 212.

In its reply brief, the State of Wisconsin argued that the petitioner had waived his probable cause argument because he raised it for the first time in his responding brief in that court. In the Wisconsin Court of Appeals the petitioner had not challenged probable cause on the ground that the police, at the time of the arrest, had not known of a prior conviction for operating a motor vehicle while intoxicated. Wisconsin Supreme

Court reply brief of plaintiff-respondent-petitioner, at 2-5; R-Ap. 223-26. On the merits of the probable cause argument, the state contended that even if the police did not know of a prior conviction for operating a motor vehicle while intoxicated, the police had probable cause to believe that the petitioner had committed the civil offense of drunk driving; and sec. 345.22, Wis. Stats. (1977), authorized an arrest for that offense on the basis of probable cause. The state argued that this probable cause plus exigent circumstances justified the entry into the home to make the warrantless arrest. Wisconsin Supreme Court reply brief of plaintiff-respondent-petitioner, at 5-8; R-Ap. 226-29.

The Wisconsin Supreme Court reversed the decision of the court of appeals and affirmed the order of the circuit court in holding that the coexistence of probable cause and exigent circumstances justified the warrantless entry into the home to make the arrest. Welsh, 108 Wis. 2d at 321; R-Ap. 103. The Wisconsin Supreme Court found that the arrest was valid because there was probable cause and because sec. 345.22, Wis. Stats. (1977), authorized the police to make an arrest for violation of a traffic regulation where the officer had probable cause to believe that the traffic regulation had been violated. Welsh, 108 Wis. 2d at 330; R-Ap. 112. The majority of the Wisconsin Supreme Court also found that exigent circumstances were present, and that when they were coupled with the probable cause, the arrest was valid. Welsh, 108 Wis. 2d at 336-39; R-Ap. 118-21.

Nowhere in its opinion did the majority of the Wisconsin Supreme Court discuss whether the requirements for a valid warrantless arrest in the petitioner's home differed depending on whether the arrest was for a felony, a misdemeanor or a civil forfeiture offense. The majority of the supreme court discussed whether there were probable cause and exigent circumstances, which was the way the case was presented to the court by the parties.

In her dissenting opinion in the Wisconsin Supreme Court, Justice Abrahamson doubted the constitutionality of sec. 345.22, Wis. Stats. (1977), as far as authorizing a warrantless arrest for violation of a civil traffic offense committed outside the officer's presence. Welsh, 108 Wis. 2d at 341; R-Ap. 123. In a footnote, Justice Abrahamson pointed out that both the petitioner and the state initially treated this case as if the petitioner had been accused of violating a criminal statute and not a civil statute. The court of appeals' decision stated that the case involved a misdemeanor. In the same footnote, Justice Abrahamson noted that the state argued that the petitioner had waived the issue of whether this was a crime; but Justice Abrahamson would have exercised discretionary powers of the court to review the validity of sec. 345.22, Wis. Stats. (1977). Welsh, 108 Wis. 2d at 342-43 n.1; R-Ap. 124-25. Justice Abrahamson also pointed out that neither the petitioner nor the state had discussed the question of the validity of sec. 345.22, Wis. Stats. (1977). Because the validity of that statute was significant, Justice Abrahamson would have asked the parties for further briefing. Welsh, 108 Wis. 2d at 344; R-Ap. 126.

The petitioner did not file a motion for reconsideration in the Wisconsin Supreme Court.

SUMMARY OF ARGUMENT

The petitioner has requested this court to issue a writ of certiorari to review the question of whether the fourth and fourteenth amendments prohibit police from making a non-consensual warrantless night entry into a person's home to arrest him for a violation of a non-jailable traffic offense committed outside the presence of the officer. The respondent contends that the petitioner never raised that issue in the state courts and that the state courts did not address that issue in their decisions. Because the issue was not raised or decided in the

state courts, this court should not, indeed cannot, hear and decide the issue.

The petitioner also argues that there was not proof of exigent circumstances because the record contains no evidence of how long it would have taken to obtain a warrant. The respondent submits that this issue merely raises a question of the sufficiency of the evidence, which is not an issue normally reviewed by this court. In addition, the petitioner did not raise this issue in the Wisconsin Court of Appeals or the Wisconsin Supreme Court.

ARGUMENT

IN THE STATE COURTS THE PETITIONER DID NOT RAISE THE ISSUES HE HAS PRESENTED FOR REVIEW IN THIS COURT; AND, THEREFORE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

In the Wisconsin state courts the petitioner never raised the issues he is now presenting to this court. In the state courts he never argued that a warrantless arrest in the home for a non-jailable offense cannot be valid under the fourth and fourteenth amendments. Until he filed his responding brief in the Wisconsin Supreme Court, the petitioner always treated the case as one involving a misdemeanor and only contended that the issues were whether the police possessed probable cause and whether exigent circumstances existed to justify the warrantless arrest. In his responding brief in the Wisconsin Supreme Court, the petitioner argued that the police had no probable cause to believe that a misdemeanor had been committed because there was no showing that the police knew whether the petitioner had a prior conviction for drunk driving. Nevertheless, this argument was framed in the context of a challenge to the probable cause finding; and the petitioner did not contend that the fourth and fourteenth amendments prohibited any warrantless arrest in his home for a non-jailable offense. The petitioner only questioned whether the police possessed probable cause.

The majority of the Wisconsin Supreme Court addressed only the issues raised by the parties, i.e., issues relating to probable cause and exigent circumstances. The Wisconsin Supreme Court applied the methodology recognized by this court in Payton v. New York, 445 U.S. 573 (1980). See Welsh, 108 Wis. 2d at 327; R-Ap. 109. The Wisconsin Supreme Court examined the record to determine whether the warrantless arrest was justified on the grounds that police possessed probable cause and that exigent circumstances existed. The Wisconsin Supreme Court discussed and applied sec. 345.22, Wis. Stats. (1977); but the majority did not discuss the constitutionality of that statute.

In petitioning this court for the writ of certiorari, the petitioner raises issues he did not raise in the state courts. The petitioner wants this court to consider whether a warrantless arrest in the home was invalid because the arrest was for a non-jailable offense. In her dissenting opinion in Welsh, Justice Abrahamson indicated that this issue was not raised or argued by the parties and was not discussed by the majority of the Wisconsin Supreme Court. See Welsh, at 342-43 n.1, and 344, dissenting opinion of Justice Abrahamson; R-Ap. 124-26.[1/]

The failure of the petitioner to raise this issue in the state court briefs is evidence that he did not raise it in the state courts. Amalgamated Food Employee's Union v. Logan Valley Plaza, 391 U.S. 308, 313 n.6 (1968); and Beck v. Washington, 369 U.S. 541, 553 (1962). Because the issue was not raised by the petitioner and because the issue was not decided or discussed by the Wisconsin Court of Appeals or the majority of the Wisconsin Supreme Court, this court cannot review this issue

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[1/] In her dissenting opinion, Justice Abrahamson in footnote 1 of 108 Wis. 2d at 343, stated that there was no indication the offense was criminal. This statement was not accurate because the complaint charged a misdemeanor offense for operating a motor vehicle while intoxicated. See R-Ap. 150. The complaint did not have to allege the petitioner's prior conviction for operating while intoxicated because the prior conviction was not an element of the crime. See State v. McAllister, 107 Wis. 2d 532, 319 N.W.2d 865 (1982).

upon the issuance of a writ of certiorari. Beck, 369 U.S. at 553-54, and Amalgamated Food Employee's Union, 391 U.S. at 313 n.6, and dissenting opinion of Justice Harlan in 391 U.S. at 334-36.

Therefore, the respondent submits that this court should not grant the petition for writ of certiorari to consider whether the fourth and fourteenth amendments prohibit the police from making a nonconsensual warrantless night entry into a person's home to arrest him for violation of a non-jailable traffic offense committed outside the presence of the officer.

The petitioner has also argued that this court should grant the petition for writ of certiorari because the record does not contain sufficient evidence to show that exigent circumstances existed that would justify the warrantless entry into the home. At page 6 of his petition for writ of certiorari, the petitioner contends that the record contains no evidence on how long it would take to obtain a warrant within the City of Madison between 9:00 and 9:30 p.m.

The respondent contends that the Wisconsin Supreme Court properly applied the methodology set forth by this court in Payton, i.e., the Wisconsin Supreme Court examined the record for probable cause and exigent circumstances to justify the warrantless entry into the home, to make the arrest. The majority opinion of the Wisconsin Supreme Court fully demonstrates that that court applied the correct law. The only question raised by the petitioner is whether sufficient evidence was presented to support the legal conclusions.

The respondent submits that the petitioner is merely raising a question of sufficiency of the evidence to support the court's finding of exigent circumstances. Sufficiency of the evidence is not the type of question this court normally reviews on certiorari. United States v. Johnston, 268 U.S. 220, 227 (1925); Southern Power Company v. North Carolina Public Service Commission, 263 U.S. 508, 509 (1924), and Houston Oil Company v.

Goodrich, 245 U.S. 440, 441 (1918). Therefore, the respondent submits that this court should not grant the petition for writ of certiorari to consider this issue.

In addition, in neither the Wisconsin Court of Appeals nor the Wisconsin Supreme Court did the petitioner challenge the existence of exigent circumstances on the ground that no evidence was submitted as to the time it would take to obtain the warrant. Therefore, because the issue was not raised in the state courts, it cannot be raised in this court on a writ of certiorari.

CONCLUSION

For the reasons discussed above, the State of Wisconsin, respondent, requests this court to deny the petition for writ of certiorari.

However, if this court grants the petition for writ of certiorari, the respondent wishes to retain the right to raise the arguments it raised in the Wisconsin state courts in support of the legality of the arrest.

Dated this 6th day of December, 1982.

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APPENDIX

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STATE of Wisconsin, Plaintiff-Respondent-Petitioner,

v.

Edward G. WELSH, Defendant-Appellant.

Supreme Court

No. 80-1686. Argued March 1, 1982.—Decided July 2, 1982.

(Reversing 102 Wis. 2d 727, 308 N.W.2d 772.)

1. Searches and Seizures § 33*—acts without warrant—probable cause.
Evidence was sufficient to establish probable cause to justify warrantless entry of defendant's home, where evidence included testimony of eyewitness that defendant was intoxicated, where defendant left scene of accident and where officer recollected that he had been involved with defendant in recent alcohol related disturbance.

2. Searches and Seizures § 33*—acts without warrant—reliability of informant.
Citizen who purports to be victim of or to have witnessed crime is reliable informant even though his reliability has not theretofore been proved or tested.

3. Automobiles and Other Motor Vehicles § 731*—driving under influence of intoxicants—warrantless search of home—exigent circumstances.
Evidence was sufficient to establish exigent circumstances justifying officer's warrantless entry into defendant's home, where eyewitness at scene of accident informed officer that defendant was intoxicated, defendant had left scene of accident and where officer made prompt attempt to locate defendant in order to prevent him from returning to his, or another automobile, where he could have continued to drive in his condition.

ABRAHAMSON and HEFFERNAN, JJ., dissent.

REVIEW of a decision of the Court of Appeals. *Reversed.*

* See Callaghan's Wisconsin Digest, same topic and section number.

For the plaintiff-petitioner the cause was argued by *Stephen W. Kleinmaier*, assistant attorney general, with whom on the briefs was *Bronson C. La Follette*, attorney general.

For the defendant-appellant there was a brief and oral argument by *Archie E. Simonson* of Madison.

WILLIAM G. CALLOW, J. This is a review of a May 26, 1981, decision of the court of appeals vacating an order of Dane County Circuit Judge Mark A. Frankel and remanding the matter to the circuit court for further proceedings. We reverse the decision of the court of appeals and affirm the order of the circuit court. The trial court revoked the defendant's motor vehicle operator's license for sixty days pursuant to his unreasonable refusal to submit to a breathalyzer test, as required by sec. 343.305(2)(a), Stats. 1977,[1] after having been issued a citation for the operation of a motor vehicle while under the influence of an intoxicant. Section 346.63(1), Stats. 1977.[2]

[1] Section 343.305(2)(a), Stats. 1977 provides that

"Revocation of license on refusal to submit to tests . . . (2)(a) If a law enforcement officer has probable cause to believe that a person has violated s. 346.63(1) or a local ordinance in conformity therewith, the officer may request the person, prior to arrest and issuance of a citation, to take a preliminary breath test for the purpose specified under sub. (1), using a device approved by the department for the purpose. A person may refuse to take a preliminary breath test without being subject to revocation under sub. (9) if he or she consents, after arrest, to take a test under par. (b). Neither the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant or a controlled substance." *Id.*

[2] Section 346.63(1), Stats. 1977, provides that "[n]o person may drive or operate a motor vehicle while under the influence of an intoxicant or a controlled substance."

The defendant challenges the officer's warrantless arrest in his residence as violating the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution.[3] The circuit court upheld this warrantless arrest concluding that probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant, coupled with the existence of exigent circumstances, justified the officers' entry into the defendant's residence. The defendant appealed from this circuit court order, and a single judge of the court of appeals reversed the trial court, holding that, although the officers' warrantless arrest was unreasonable, thereby violating the Fourth and Fourteenth Amendments, the absence of a finding regarding a consensual entry necessitated remanding the case on that issue. We affirm the findings of the circuit court, holding that the co-existence of probable cause and exigent circumstances in this case justifies the warrantless arrest and obviates any further discussion concerning the issue of consensual entry.

Prior to resolving the merits of this case, the state challenges the single-judge ruling of the court of appeals, contending that this should have been decided by a three-judge panel. Section 752.31(2), Stats. 1977, provides a

[3] The requirements contained in the Fourth Amendment of the Federal Constitution are binding against the states through the Fourteenth Amendment. Further, the provisions of the Fourth Amendment to the Federal Constitution are identical to those contained in Article I, sec. 11 of the Wisconsin Constitution. Both provide that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution Amendment IV; *see* Wisconsin Constitution, Article I, sec. 11.

categorization of cases subject to review by a single court of appeals judge, as opposed to a three-judge panel.[4] This dispute focuses on whether the defendant's unreasonable refusal to submit to a breathalyzer test pursuant to sec. 343.305(2)(a), Stats. 1977, falls within the purview of sec. 752.31(2)(c), Stats. 1977, authorizing a single-judge appeal in cases involving violations of traffic regulations. The state contends that the statutory penalty imposed for violation of a traffic regulation, as defined in sec. 345.20(1)(a), Stats. 1977, is a forfeiture. According to sec. 288.01, Stats. 1977, however, a forfeiture is defined as "any penalty, in money or goods" and the penalty pursuant to violating sec. 343.305, Stats. 1977 is a suspension of operating privileges. Consequently, the state argues that a suspension is not a forfeiture and therefore is not included within the parameters established in sec. 752.31(2), Stats. 1977. The defendant's timely notice of appeal conferring jurisdiction to the court of appeals vitiates the need to determine whether

[4] Section 752.31(1), (2), (3), Stats. 1977 provides:

"752.31 Disposition of cases. (1) Except as otherwise provided in this section, the court of appeals shall sit in panels of 3 judges to dispose of cases on their merits.

"(2) Appeals to the court of appeals in the following types of cases shall be heard as specified in sub. (3):

"(a) Cases under ch. 299.

"(b) Municipal ordinance violation cases.

"(c) Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a).

"(d) Cases under ch. 51.

"(e) Cases under ch. 48.

"(f) Misdemeanors.

"(3) A case specified under sub. (2) shall be heard by one court of appeals judge, except that any party on appeal may move in writing to the chief judge of the court of appeals that the case be heard by a 3-judge panel. The chief judge may grant or deny the request ex parte. Any appeal which is heard by a single court of appeals judge shall be heard in the county where the case or action originated if any party so requests."

sec. 343.305(2)(a), Stats. 1977, is a traffic regulation. For if the court of appeals in its exercise of jurisdiction erroneously assigns this case to a single judge rather than to a panel, this alleged error, and we need not rule whether the court of appeals erred in this case, was waived when neither the state nor the defendant interposed a timely objection. Although resolving this issue is unnecessary in the present case, it is instructive to note that sec. 752.31(2)(c), Stats., 1979–1980, was recently amended to include license suspension "cases under sec. 343.305," thereby expressly incorporating these cases within the parameters of sec. 752.31(2)(c), authorizing a single judge appeal. See sec. 2, ch. 152, Laws of 1981 (effective March 31, 1982).

The factual sequence underlying this dispute can be summarized through the testimony of the sole witness, Randy Jablonic. On the evening of April 24, 1978, Jablonic, a University of Wisconsin rowing coach, was driving alone in his truck. It was raining. He noticed that the driver of the automobile ahead of him was experiencing difficulty in operating his vehicle. In addition to the automobile's erratic speed, it was moving from side to side, crossing into the opposing lane, barely missing a road sign, a median strip, and the oncoming traffic. The vehicle ultimately left the road entirely and drove into a field where it either became stuck or stalled.

Jablonic, concerned that the car might return to the road and fearful "[b]ecause I realized [he] would probably kill somebody" remained at the scene blocking the car to be certain that the car did not return to the highway. A motorist stopped and Jablonic requested her to alert the police. An officer arrived at the scene shortly thereafter.

Prior to the officer's arrival, however, the driver left the automobile in the field and approached Jablonic's truck. Jablonic testified that the driver asked him for a

ride home but Jablonic replied that they should wait for assistance in removing or repairing the car, rather than leaving it in the field. At this point the driver became alarmed and "broke into a very slurred conversation—'you wouldn't get your cops'—or something it was very insecure and not very controlled conversation." The driver then left Jablonic and headed back across the field abandoning the automobile and departing from the scene of the accident.

The police arrived "practically immediately upon, . . . his departure" and spoke with Jablonic who had remained at the scene. Jablonic responded to the officer's inquiry by describing his observations of the automobile and its driver. Jablonic told the officer that he believed that the driver "was very inebriated or very sick or not very much in possession of his faculties or ability to perform." When asked at trial what formed the basis of his opinion that the defendant was inebriated, he testified ". . . the erratic motion of the car, and then the staggering and slurred speech that [the driver] exhibited when he was trying to talk" constituted the basis upon which he formed his conclusion that the driver was intoxicated. He further described the driver's walk as unsteady and unsure. He stated that when he spoke with the driver at the roadside he had remained in his truck. Consequently, he declared that he had "no opportunity to smell the [driver's] breath." Jablonic further testified that he commonly "see[s] many inebriated people, unfortunately," demonstrating his familiarity with the symptons of intoxication. Although Jablonic stated that "he [the driver] was very inebriated or very sick or not very much in possession of his faculties or ability to perform," this statement, when considered within the context of the entire record, demonstrates the propriety of the trial judge's conclusion that Jablonic conveyed the definite impression that the driver was intoxicated. Jablonic's reference to

illness was merely a remote possibility which provided an alternative, more charitable explanation—illness—to account for his erratic driving, unsteady movements, and slurred speech. The record supports the trial judge's ruling that the officer had probable cause to believe that the driver was intoxicated.

At the scene of the accident the officer ran a license check to determine the vehicle owner's identity. Although the officer could not conclude that the owner of the abandoned automobile was necessarily its driver, he did correctly recall that he was involved in the arrest of the owner in an alcohol-related disturbance within two weeks prior to this accident. The officer's recollection was sufficiently pertinent to provide additional evidence to support the existence of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence which was located near the scene of the accident. Attempting to confirm his belief that the defendant had, in fact, been driving his abandoned vehicle while under the influence of an intoxicant, the officer, arriving at the defendant's residence, asked the defendant's stepdaughter if the defendant was at home. The officer testified that she replied, he had "just stumbled in . . . ." "He is upstairs, and motioned that way—towards the stairs, allowing us to pass." Proceeding up the staircase, the officer encountered the defendant's wife. He testified that she asked:

" 'What is going on,' . . . again, we explained there had been an accident, . . . And we would like to speak with him because *we thought he was probably under the influence of an intoxicant*. And she, at that point, also gave her consent for us to go up, because she said, 'Yes, he is in bed. He just got into bed. And something has to be done,' referring to the fact that she recognized me from the earlier—I assumed she recognized me from the

earlier case, and was, I think, saying that she was concerned about his alcoholic problem. And she indicated, 'Something has to be done,' and motioned us to the bedroom." (Emphasis added).

Affirming the trial court's dual finding of probable cause and exigent circumstances vitiates the need to remand this case to the circuit court on the issue of consensual entry, as was ordered by the court of appeals.

The issue in the present case addresses the delicate interrelationship between the individual's right to privacy and the governmental responsibility to enforce the law in a manner which serves the public interest. To prevail in this case, the state must prove the co-existence of probable cause[8] and exigent circumstances, justifying the officer's conduct at the defendant's residence. We hold that there was ample evidence supporting the trial court's ruling that the officer's entry was justified on the basis of both probable cause and exigent circum-

[8] The arrest in the present case is statutorily authorized in sec. 345.22, Stats. 1977. This statute only requires probable or reasonable cause to effectuate a warrantless arrest.

Section 345.22, Stats. 1977, provides:

"345.22 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."

The "reasonable grounds to believe" language in sec. 345.22 is synonomous with the constitutional standard of probable cause. *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977). Consequently, our reference to probable cause in the present case shall be interpreted as being used interchangeably with and meeting the statutory standard of "reasonable grounds to believe." Section 345.22, Stats. 1977.

Section 345.22 only requires probable cause in its authorization of a warrantless arrest for violation of a traffic regulation. The instant case, however, meets the statutory probable cause standard in addition to meeting the case law requirements of probable cause *coupled with exigent circumstances*.

stances. Entry to effect a warrantless arrest in a residence is subject to the limitations imposed by both the United States and the Wisconsin Constitutions. U.S. Const. amend. IV; Wis. Const. art. I, sec. 11. The individual's right to privacy in the home is a fundamental freedom protecting the individual from unreasonable governmental interference; however, this fundamental right is not absolute. It is subject to limited but well-established exceptions where the public interest requires that proper authorities may impinge upon the individual's right to privacy. In these instances of compelling public need, the government bears the burden of proving that the public interest supersedes the individual's right to privacy. Consequently, to insure the validity of a warrentless arrest, the state must prove probable cause, coupled with exigent circumstances. *E.g., Dunaway v. New York*, 442 U.S. 200 (1979); *Henry v. United States*, 361 U.S. 98, 102 (1959); *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (1971); *see Payton v. New York*, 445 U.S. 573, 575, 583–88 (1980) [citing *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978)].[6]

[6] Both *Payton* and *Laasch* are Fourth Amendment cases, providing fundamental support for our position in the present case. *Payton v. New York*, 445 U.S. 573 (1980); *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978). Although a cursory reading of *Payton* suggests that it is unconstitutional for police officers, having probable cause, to enter a private residence without a warrant, it is clearly distinguishable from the case at bar because, unlike the present case, *Payton* expressly disavows a finding of exigent circumstances. *Payton* states that,

"[a]lthough it is arguable that the warrantless entry to effect Payton's arrest might have been *justified by exigent circumstances*, none of the New York courts *relied on any such justification*. The [New York court] treated both Payton's and Riddick's cases as involving routine arrests in which *there was ample time to obtain a warrant*, and we will do the same. Accordingly, *we have no occasion to consider the sort of emergency or dangerous situation*,

This dual finding is subject to numerous and diverse interpretations. The common feature underlying all search and seizure interpretations, however, is the *reasonableness* of the government's intrusion when considered within the context of the totality of the circumstances. *See: State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676 (1981); *Bies v. State*, 76 Wis. 2d 457, 468, 251 N.W.2d 461 (1977). The United States Supreme Court has addressed the concepts suggestive of analysis in determining the reasonableness of the governmental interference with the individual's Fourth Amendment rights. "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50–51 (1979). Moreover "'[w]hether an inquiry is considered reasonable must depend upon the facts in each case and must turn on the application of what is essentially an indeterminate and flexible test.'" *Bies v. State*, 76 Wis. 2d at 466 [quoting

described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583 (footnote omitted) (emphasis added).

Likewise, the defendant's warrantless arrest in *Lausch v. State* occurred absent a showing of exigent circumstances. In *Lausch*, the issue before this Court was "whether, in the *absence of any exigent circumstances*, a police officer may enter a suspect's home without consent in order to make a warrantless arrest." 84 Wis. 2d at 593 (emphasis added). Admittedly of less significance than the absence of exigency, the arresting officers in *Lausch* were arguably afforded ample time to obtain a warrant, as there was a thirteen-day interval between the defendant's offense and her arrest. *Id.* at 588–89.

Consequently, the time lapse and the absence of exigent circumstances in both *Payton* and *Lausch* limit their applicability to the present case. In this case, we hold that the existence of exigent circumstances contributes to our justification of Welsh's arrest.

Browne v. State, 24 Wis. 2d 491, 507, 129 N.W.2d 175 (1964)]. Although the State must prove the existence of both probable cause and exigent circumstances, negating any implication of adherence to a mere balancing test, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis. Exigent circumstances and particularly probable cause, are not susceptible to stringently mechanical definitions. Frequently, case law has offered guidance through example rather than by definition. Consequently, the particularities and peculiarities of a given case are considered in the context of reasonableness. Accordingly, thorough analysis seeks to ascertain whether the case, in its entirety, while meeting the dual standards of probable cause and exigency, veritably accommodates this context of reasonableness.

I. *PROBABLE CAUSE*

The probable cause standard required to arrest dictates that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. The evidence must show that there is more than a possibility or suspicion that the defendant committed the offense. The evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Paszek*, 50 Wis. 2d at 624–25. In *State v. Paszek*, 50 Wis. 2d at 624–25, we described probable cause as follows:

"Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the

information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. Probable cause is defined in *Draper v. United States*, *supra*, p. 313, as:

"'"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132."'" *State v. Paszek*, 50 Wis. 2d at 624–25 (citations omitted).

To effectuate a warrantless, nonconsensual entry into the residence, in addition to exigent circumstances the officers had to have probable cause to believe that the defendant had committed the offense of driving while under the influence of an intoxicant at the time they entered the home.

[1]

Examination of the record demonstrates the existence of probable cause, satisfying the first requisite of the two-pronged test necessary to justify the officer's warrantless entry and arrest of the defendant. In this case, the officer had a substantial amount of reliable information, indicating to a reasonable police officer that the defendant had probably violated the statute prohibiting driving while under the influence of an intoxicant. *See* secs. 345.22; 346.63(1), Stats. 1977.

[2]

Arriving at the scene of the accident the officer was met by Jablonic, the sole witness to the driver's conduct.

There is nothing in the record which challenges the reliability of either his observations or his statements to the officer. Adhering to the standard for reliability established in *State v. Cheers*, we held

" ' "that a valid arrest without a warrant may be made solely by reason of information communicated by a reliable informant. . . . A *citizen who* purports to be a victim of or to have *witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested.* . . . The rationale underlying this principle is that such a person, as the observer of criminal activity, acts openly in aid of law enforcement when he reports the crime to the police." ' " 102 Wis. 2d at 395–96. (emphasis added) (emphasis in original omitted) [quoting *State v. Paszek*, 50 Wis. 2d at 631].

Consequently, Jablonic's information satisfies both prongs of the *Cheers* test for reliability.

In the *Cheers* case we discussed an additional " 'factor to be considered in determining whether probable cause exists,' " namely, that the defendant's "conduct and retreat or 'flight' from the police officers' show of authority immediately prior to the time of his arrest certainly constitutes evidence of consciousness of guilt." *State v. Cheers*, 102 Wis. 2d at 391. The defendant's statements, as well as his immediate retreat from the scene in fleeing to his home at the mention of police officers, clearly "constitutes evidence of consciousness of guilt" and is an additional factor buttressing our conclusion that the trial court properly found the existence of probable cause.

Jablonic told the officer at the scene of the accident that the officer had arrived "practically immediately upon [the driver's] departure." The officer's license check identified the owner of the vehicle. As we have noted, ownership does not necessarily indicate the driver's identity; however, the officer correctly recalled his involvement in the recent arrest of the owner in an al-

cohol-related dispute. Jablonic did not give a detailed description to the officer of the driver's physical features, but he did state that the driver was a man wearing wet clothing. This information, coupled with Jablonic's observations of the defendant's erratic driving patterns and his personal conduct, further supports the trial court's holding of probable cause.

Acting upon his collective knowledge of the situation, the officer proceeded immediately to the defendant's residence and was told that the defendant "had just stumbled in." While the officer, prior to his arrival at the house, had probable cause to believe that the defendant was the driver of the abandoned automobile, the defendant's stepdaughter's statement provided additional evidence in support of the proposition that the defendant was the driver because she said he had stumbled in only moments before the officer had arrived.

The word "stumbled" buttressed the witness's belief that the defendant was intoxicated. The fact that the defendant had just returned home on this rainy night supports the officer's belief that the defendant was the driver of his just abandoned car. The officer believed that he had probable cause, declaring that he "thought [the driver] was probably under the influence of an intoxicant."

Although the defendant contends that the officer proceeded to the residence to determine whether he had sufficient evidence to establish probable cause to enter and arrest the defendant, we do not find this contention persuasive. The officer, acting upon Jablonic's observations, coupled with his own accurate recollection of his involvement in the arrest of the defendant in a recent alcohol-related disturbance, had probable cause when he proceeded to the residence. The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause.

Scrutiny of the record, in its entirety, indicates that the officer had probable cause before he entered the defendant's residence. Although the officer may not have been absolutely certain that the defendant was driving while under the influence of an intoxicant, absolute certainty is not the standard employed in determining the existence of probable cause.

The officer's conversation with the defendant's stepdaughter before entering the home provided further evidence establishing the existence of probable cause. The officer testified that,

". . . it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

The defendant argues that this statement demonstrates that the officer did not believe he had probable cause and was going to the defendant's bedroom solely to investigate. The officer's statement, when considered along with his declaration that the defendant "was probably under the influence of an intoxicant," demonstrates that the investigating statement is not being read by the defendant in the context of the entire record. The officer, correctly believing that he had probable cause, merely recognized that he was not absolutely positive that the defendant had been operating his automobile while under the influence of an intoxicant. The defendant could have been drinking after he returned to his home, thereby rendering the results of a blood alcohol test meaningless. Moreover, if the defendant had been ill, rather than intoxicated, the officer would have changed his original conclusion on which he had predicated the existence of probable cause. Consequently, the officer's statement merely acknowledged that he was not absolutely certain

that the defendant was driving while under the influence of an intoxicant, and prior to arresting the defendant, he was willing to reconsider his initial conclusion if necessary. A synthesis of these facts negates the possibility that the officer only had a mere suspicion that the defendant was driving while under the influence of an intoxicant in violation of sec. 346.63(1), Stats. 1977.

The foregoing evidence, when myopically parsed, may not individually support a finding of probable cause. When examined collectively, however, it unquestionably indicates "that quantum of evidence which would lead a reasonable police officer to believe that the defendant [driver] probably [violated the statute prohibiting driving while under the influence of an intoxicant]."[7] *State v. Cheers*, 102 Wis. 2d at 386; *see Henry v. United States*, *supra*; secs. 345.22 and 346.63(1), Stats. 1977. The evidence in this case clearly demonstrates that the trial court was correct in ruling that the state had met its burden.

In considering the governmental interest, it is appropriate to note that driving under the influence is a pervasive problem of substantial proportion. In Wisconsin in 1981, there was a 5 percent increase in drunken driving convictions from 1980.[8] Further, approximately 50 per-

[7] Consequently, *Welsh* meets the probable cause standard articulated in both the majority and dissenting opinions in *State v. Cheers*, 102 Wis. 2d 367, 386, 306 N.W.2d 676 (1981); *Id.* at 406, 408 (Abrahamson, J., dissenting).

[8] Wisconsin Department of Transportation figures show that in 1981 there were 32,506 convictions for drunken driving. Drunken driving statistics covering years prior to 1981 have been published in annual reports entitled, Anderson, *Wisconsin Accident Facts* (prepared by the Traffic Accident Data Section of the Division of Motor Vehicles, Department of Transportation [hereinafter *Wisconsin Accident Facts*]).

In Wisconsin in 1980, there were 30,409 convictions for drunken driving. *Wisconsin Accident Facts* 16–17 (1980).

cent of all drivers killed in Wisconsin were driving while legally intoxicated.[9] The increasing number of fatalities caused by drunken drivers has aroused state legislatures to adopt stricter penalties in the forms of substantial fines, imprisonment, and license suspensions to punish those who violate the laws prohibiting driving while under the influence of an intoxicant.[10]

[9] In 1980, 583 drivers were killed. Of these drivers, 470 were tested for blood alcohol content, and 269 were found to be legally intoxicated, having a minimum blood alcohol content of .10 percent. *Wisconsin Accident Facts* 1 (1981). Similarly in 1978, 576 drivers were killed; while 226 of the 448 tested were found to be legally intoxicated. *Wisconsin Accident Facts* 1 (1979).

[10] Sec. 967.055, Stats., created by Chapter 20, Laws of 1981, provides:

"Sec. 967.055 Dismissing or amending charges; operating a motor vehicle, intoxicant or controlled substance. (1) INTENT. The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, or a controlled substance or both.

"(2) DISMISSING OR AMENDING CHARGE. Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63(1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25 or s. 940.09 where the offense involved the use of a vehicle or an improper refusal under s. 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant or both."

See Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving*, 55 Wis. B. Bull. 9 (April, 1982); *e.g.*, sec. 346.63(1), Stats., repealed and recreated by Chapter 20, Laws of 1981; sec. 346.65(2), Stats., repealed and recreated by Chapter 20, Laws of 1981; *see also* Hammer, *The New OMVWI Law: Wisconsin Changes Its Approach to the Problem of Drinking and Driving*, 55 Wis. B. Bull. 15, 17 (May, 1982).

II. *EXIGENT CIRCUMSTANCES*

[3]

In addition to the existence of probable cause, accompanying proof of exigent circumstances must be shown in order to justify this warrantless entry. Proof of exigency vitiates the need for a warrant under those circumstances when obtaining a warrant could frustrate the arrest. An analysis of the facts demonstrates that, in this case, exigent circumstances justified this officer's warrantless entry to effect the arrest of the defendant.

Frequently, proof that the officer is in hot pursuit of the suspect constitutes exigency. The hot pursuit doctrine evolved to encompass situations where time was of the essence. In other words, when requiring the police to obtain a warrant would constitute undue delay, the hot pursuit doctrine is applicable. In this case, time was of the essence. The inherent nature of the offense demanded the suspect's immediate apprehension to accommodate the dictates of the blood alcohol test statute. Section 343.305(2)(a), Stats. 1977. In order for the officer to enforce the statutory requisites, the situation demanded his immediate search for and pursuit of the suspect.

The defendant, fearful of the officer's impending arrival and perhaps recognizing the possibility of being requested to submit to a blood alcohol test, left the scene of the accident upon discovering that the officer had been summoned. Fleeing to his home, in an attempt to avoid a confrontation with the officer, the defendant's hasty departure resulted in the abandonment of his car. If the officer had retreated and sought to obtain a warrant, rather than immediately pursuing and arresting the suspect, the requirements of the blood alcohol statutes would have been frustrated.

The imminent threat to safety doctrine also constitutes exigent circumstances. The sole purpose of the blood al-

cohol test is to facilitate prosecution of those driving while under the influence of an intoxicant. *See* sec. 343.305(2)(a) and 346.63(1), Stats. 1977. Further, sec. 345.24, Stats. 1977, provides that a person arrested for driving while under the influence of an intoxicant "may not be released until four hours have elapsed."[1] This severe treatment is dramatic evidence of the legislature's intent and recognition of the need to protect the public from drunken drivers. Undoubtedly, this provision was enacted to prevent drunken drivers from returning to the road while intoxicated. Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level, equal to or less than .05 percent. Restraining those drivers who pose a danger to themselves and the public for the four-hour statutory period constitutes a preventive measure, designed to promote public safety.

The officer concluded that he had probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant. Accordingly, the situation demanded the officer's prompt attempt to locate the defendant. An arrest would prevent the driver from returning to his, or another automobile, where he could have continued to drive in his current state, posing a danger to himself and the public. Consequently, the nature of this offense, coupled with the po-

[1] Section 345.24, Stats. 1977, provides in its entirety:

"345.24 **Officer's action after arrest for driving under influence of intoxicant.** A person arrested under s. 346.63 or an ordinance in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be released until 4 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305(2)(b) shows that there is .05% or less by weight of alcohol in the person's blood, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest."

tential threat to the public safety, satisfied the exigent circumstances test pursuant to the imminent threat to safety doctrine.

An equally persuasive argument is the probable destruction of evidence. This is a model case demonstrating the urgency involved in arresting the suspect in order to preserve evidence of the statutory violation. "Sometimes the nature of the evidence will be such that it will soon disappear of its own accord." 2 W. LaFave, *Search and Seizure*, sec. 6.5 at 448 (1978). "Blood rapidly metabolizes alcohol after a person ceases drinking; thus creating an exigent situation." *State v. Bentley*, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979). Without an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of the defendant's alleged violation of sec. 346.63(1), Stats. 1977, would be destroyed. *See* sec. 343.305(2)(a), Stats. 1977. Accordingly, the facts of this case adhere to the presumption favoring warrantless arrests which are a result "of an ongoing investigation in the field," rather than an arrest that had been planned. W. LaFave, *supra*, sec. 6.1 at 391.[13]

[13] Professor LaFave, a preeminent authority on the Fourth Amendment, distinguished a finding of exigency in cases involving p' ned arrests as opposed to those relating to an ongoing investigation in the field:

"A 'planned' arrest is one which is made after a criminal investigation has been fully completed at another location and the police make a deliberate decision to go to a certain place, either the arrestee's home or some other premises where he is believed to be, in order to take him into custody. . . . Courts have understandably been reluctant to accept police claims of exigent circumstances in these situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained." W. LaFave, *supra*, sec. 6.1 at 391.

"On the other hand, when the occasion for arrest arises while the police are already out in the field investigating the prior or

In summary, we conclude that this situation did not afford the officer ample time in which to obtain a warrant. Further, the record demonstrates that the officer's conduct was reasonable within the context of the surrounding circumstances. Accordingly, we affirm the circuit court's holding, finding the existence of both probable cause and exigent circumstances in the present case.

By the Court.—The decision of the court of appeals is reversed.

CECI, J., took no part.

SHIRLEY S. ABRAHAMSON, J. (*dissenting*). As a result of the decision in this case, if a witness reports to the police that:

(1) a few moments ago, on this dark, rainy night he saw a car being driven erratically into a field;

(2) he observed and spoke with the driver of the car but does not know the name of the driver;

(3) the driver staggered and had slurred speech but that the witness had no opportunity to smell any alcohol on the driver's breath;

(4) the driver was either very inebriated or very sick; and

(5) there was no damage to any person or any property;

then the police officers, relying on a statute allowing an officer to arrest a person without a warrant for violating a civil traffic regulation (a civil, not a criminal offense)

ongoing conduct which is the basis for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant. Here, *the presumption should be in favor of a warrantless arrest rather than against it*, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it." *Id.* at 392 (emphasis added) (footnote omitted).

committed outside his presence, after checking to find that the title to the car is in your name, may, without your consent and without having a search warrant or arrest warrant issued by a judicial officer:

(1) go to your home at night;

(2) enter your home;

(3) climb the stairs to your second-floor bedroom;

(4) look around your bedroom to see if the clothes you took off match the description of the clothes worn by the driver of the car; and

(5) ask you, as you lie naked in your bed, to get out of bed so that the officers can determine whether you are intoxicated.

I dissent because I conclude that this warrantless invasion into your privacy in your home to investigate whether you violated a civil traffic statute contravenes sec. 11, Art. I, of the Wisconsin constitution and the fourth amendment to the federal constitution which guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ."

The essence of the fourth amendment is that a judicial officer with the power to issue a warrant, not a policeman or government agent, decides whether the government can enter your home without your consent. As Justice Jackson so eloquently stated:

"Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

In a free society a warrant provides fourth amendment protection (1) by substituting the judgment of a judicial officer for that of the police officer; (2) by preventing hindsight from coloring the determination of probable cause; and (3) by providing the person subject to the arrest with assurance that the police officer is acting within lawful authority. *United States v. Martinez-Fuerte*, 428 U.S. 543, 565–66 (1976). Under our constitution a warrantless arrest is unreasonable except in a few "jealously and carefully drawn" exceptional circumstances. *Jones v. United States*, 357 U.S. 493, 499 (1958).

In our country a warrantless entry into a home by a police officer is presumed unreasonable, because our society recognizes the special sanctity of the home. In *Payton v. New York*, 445 U.S. 573, 585–86 (1980), the United States Supreme Court clearly proclaimed that the "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,'" and that "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." It is only when "exigencies of the situation . . . make warrantless entry *imperative*" that warrantless entry into a person's home may be condoned. *Laasch v. State*, 84 Wis. 2d 587, 594, 267 N.W.2d 278 (1978). (Emphasis added.)

I dissent because I conclude that the warrantless intrusion into the defendant's home in the instant case is unconstitutional. First, I have grave doubts as to the constitutionality of sec. 345.22, Stats. 1977, authorizing a warrantless arrest for violation of a civil traffic offense committed outside the officer's presence. Absent sec. 345.22 the officer has no statutory or common law authority to arrest the defendant without a warrant. Second, assuming arguendo that a police officer has authority to arrest the defendant without a warrant for vio-

lation of a civil traffic offense committed outside the officer's presence if the officer had reasonable grounds to believe that the person violated a traffic regulation, the facts in this record do not support the majority's conclusion that the officer had probable cause to believe that the defendant committed the civil offense of operating a motor vehicle while intoxicated. Third, the facts do not justify the legal conclusion that the circumstances were exigent, making the warrantless entry into the defendant's home "imperative." *Laasch v. State*, *supra*, 84 Wis. 2d at 594.

Arrest for a Civil Offense. In contrast to the cases cited and relied upon by the majority to justify a warrantless entry into the defendant's home, this case does not involve a warrantless arrest for a felony. This case does not involve a warrantless arrest for a misdemeanor. This case does not even involve a warrantless arrest for the violation of a civil traffic statute committed in the presence of an officer. This case involves a warrantless arrest for the violation of a civil traffic statute committed outside the presence of an officer.

The majority states that the officer's power to arrest is predicated on sec. 345.22, Stats. 1977, which states:

"345.22 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation."[1]

[1] Both the defendant and the state initially treated this case as if the defendant was accused of violating a criminal statute and not a civil statute. The court of appeals decision stated that the case involved a misdemeanor yet there is no proof in the record that the defendant was involved in a crime. A first violation of sec. 346.63(1) is a civil forfeiture; a second or subsequent violation of within the statutory time period is a crime. Sec. 346.65(2)(a)1, 2. The state in its briefs referred to the officer's power to arrest under sec. 968.07(1)(d), Stats. 1979–80, the criminal arrest statute.

Sec. 345.22 is a departure from the common law doctrine of arrest and for the long-standing rules of arrest in Wisconsin. The statute was enacted in 1971. The long-standing Wisconsin rules of arrest allowed an officer to make a warrantless arrest if the officer had probable cause to believe the person had committed a felony or to believe the person committed a misdemeanor in the officer's presence. The officer could not make a warrantless arrest if the misdemeanor was not committed in the officer's presence. The common law, in contrast to the Wisconsin law, was more restrictive as to the officer's power to make a warrantless arrest for a misdemeanor. At common law the arrest was permissible only if the misdemeanor was committed in the presence of the officer and constituted a breach of the peace. *State v. Smith*, 50 Wis. 2d 460, 469, 472, 184 N.W.2d 889 (1971).

The validity of sec. 345.22, which authorizes a warrantless arrest for violation of a civil statute when the violation was committed outside the presence of the officer cannot be assumed. The constitutionality of a warrantless arrest for a *felony* committed outside the presence of an officer was not settled until 1976, and then by a divided United States Supreme Court. In *United States v. Watson*, 423 U.S. 411 (1976), the Court declared constitutional a daytime warrantless arrest in a public place for a felony committed outside the presence of the officer. The Court upheld the warrantless felony arrest in that case, reasoning that such an arrest is based on accepted common law doctrine of arrest and that if fel-

When the defendant made the point that the offense here is civil, the state agreed that there is no indication that the offense is criminal. The state in its final brief argues that because the defendant did not raise the question of whether the offense here indeed was a crime, that issue has been waived. I conclude that, regardless of the issue of waiver, the validity of sec. 345.22 is an important issue for this case and law enforcement, and we should under our discretionary powers reach it.

ony arrests were permissible only with a warrant or only in exigent circumstances effective criminal law enforcement would be significantly handicapped. The reasoning of the *Watson* case cannot be applied to uphold sec. 345.22. I cannot find that the common law allowed a warrantless arrest for the violation of a civil offense committed outside the presence of an officer. The police apparently have the authority to issue a traffic citation to a person who violated a traffic law ordering the person to present himself at court at a certain time. If we conclude that the police officer must get a warrant to arrest such a person, the effective enforcement of the traffic law will not be significantly handicapped and the constitutional protection of the sanctity of the home will be enhanced.

I have found no cases, and the majority cites none, upholding a warrantless arrest, either in a public place or in a home, for a civil traffic offense committed outside the presence of the officer. All the cases and commentary cited by the majority address the question of the validity of an arrest for a violation of a criminal statute. In *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967), the Court concluded that in the absence of compelling urgency a warrantless administrative public health search of a home violates the fourteenth amendment. Neither the defendant nor the state discusses the question of the validity of sec. 345.22. Because the validity of sec. 345.22 is of significance to traffic law enforcement in general, I would ask the parties for further briefing on this question.

At this stage, however, I wish to express my doubts about the constitutionality of sec. 345.22, Stats. 1977, to the extent that it authorizes a warrantless arrest on probable cause for a civil traffic offense committed outside the presence of an officer. Requiring a warrant in

civil traffic cases would protect the privacy of the individual guaranteed by the constitution and would not unduly burden law enforcement. If there are exceptions to the warrant requirement in civil traffic cases, these have to be defined.

Assuming arguendo that the law applicable to warrantless felony arrests can be applied without change to warrantless arrests for civil traffic offenses committed outside the presence of a police officer, I conclude there was no probable cause or exigent circumstances.

Probable Cause. In reviewing the decision of the circuit court as to probable cause, this court will not overturn findings of fact unless against the great weight and clear preponderance of the evidence, but this court will independently examine the record to make its own determination of the legal question, namely, whether the constitutional requirement of probable cause is satisfied.

The circuit court in this case stated its decision from the bench. The circuit court merely concluded that "the police did have probable cause to believe that the defendant had committed the offense of operating while under the influence." The circuit court did not make any findings of fact, did not make any analysis or summary of the facts, and did not analyze the legal principles it used to reach its legal conclusion.

There are disputed facts in this case and the credibility of witnesses is at issue. Generally where the circuit court does not expressly make a finding necessary to support its legal conclusion, this court can assume that the circuit court made the finding in the way that supports its decision. *Sohns v. Jensen*, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). See also *State v. Fillyaw*, 104 Wis. 2d 700, 727–28, 312 N.W.2d 795 (1981) (Abrahamson, J., concurring). The majority's de novo review of the record must therefore be to determine the legal signifi-

cance of the facts, not to decide the disputed facts and the credibility of witnesses.

When an arrest is made without a warrant the state bears the burden of proving the existence of probable cause. *Leroux v. State*, 58 Wis. 2d 671, 682, 207 N.W.2d 589 (1973). In the case at bar a determination by this court of the legal question of probable cause to believe that the defendant was driving while under the influence of an intoxicant turns on three pieces of information known to the officer making the arrest.

The first piece of information is the ownership of the car. This information is relied upon to establish that it is probable that the defendant was the driver of the car. Jablonic did not describe the driver sufficiently for the officer to be able to identify the defendant as the driver. The officer had to reason that because the defendant was the owner of the car, he was probably the driver.

The second piece of information on which the determination of probable cause turns is that the defendant had been arrested previously in an alcohol-related disturbance. This information is relied upon to establish that the defendant was probably intoxicated. There is no indication in the record as to the nature of the alcohol-related disturbance; as to whom, if anyone, was intoxicated during this alcohol-related disturbance; as to the nature of the offense for which the defendant was previously arrested; whether there was any finding of probable cause for the arrest; or whether any further civil or criminal proceedings against the defendant resulted from the arrest. The majority opinion says that the officer "did *correctly* recall" the arrest. (Emphasis added.) *Supra*, p. 325. See also *supra*, pp. 331, 332 where the majority states that the officer's recollection was accurate and correct. There is nothing in the record which indicates whether the officer's recollec-

tion about the previous arrest of the defendant is correct or incorrect.

I need not reach the question of when a defendant's previous arrest may be relevant and probative in determining probable cause. In the case at bar the officer's testimony as to the defendant's prior arrest is so sketchy and subject to so many interpretations that neither the circuit court nor this court can use the information about the arrest to help form its independent determination whether the facts in the possession of the officer are as a matter of law sufficient to constitute probable cause.

The third, and most important, and perhaps the only piece of information on which the determination of probable cause turns, is Jablonic's statement to the officer. This information is relied upon to establish that the driver was probably intoxicated. The critical element in determining probable cause in the case at bar is whether the information which Jablonic, a reliable eyewitness, gave the police officer is sufficient to lead a reasonable police officer to believe that the driver was probably driving under the influence of an intoxicant.

Jablonic, the only person available with first-hand information about the driver and his driving, testified that the driver was walking and speaking with difficulty and that he was either intoxicated or sick. Even though, as he testified, he was familiar with the signs of intoxication, Jablonic had good reason to be uncertain. The weather was bad, and visibility was poor. Further, Jablonic was not able to verify or discard his intoxication theory because he did not have the opportunity to smell any alcohol when the driver spoke to him and asked him for a ride. I acknowledge that the mere fact that an innocent explanation for the driver's conduct, that is, illness, may be imagined is not enough to defeat probable cause. 1 LaFave, *Search and Seizure*, sec. 3.2(e), pp. 483–84 (1978). But in this case the innocent explana-

tion for the driver's conduct is not imagined; the innocent explanation is provided by the only witness, and it is provided as a real possibility.[3] The majority, without explanation and without any basis in the record, characterizes Jablonic's reference to illness as "merely a remote possibility which provided an alternative, more charitable explanation." *Supra*, p. 325.

The officer's testimony of what Jablonic told him is inconsistent with Jablonic's testimony. The officer testified that Jablonic had a definite opinion that the driver

[3] Jablonic's entire testimony as to what he told the police officer concerning the driver's condition is as follows:

"*Q.* What did you tell the officer? Did you give the officer a description of the individual you had been talking to?

"*A.* I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to perform. And it was my feeling that he had taken off across the field.

"*Q.* What did you base your opinion on that he was inebriated?

"*A.* Well, first of all the erratic motion of the car, and then the staggering and slurred speech that he exhibited when he was trying to talk to me.

"*Q.* You have seen people or persons under the influence of an intoxicant before?

"*A.* Working at the University, it's a common—very common to see many inebriated people, unfortunately."

Jablonic described the driver as follows:

"*Q.* Did you notice anything about this person?

"*A.* They had a kind of a wet leather jacket on or something that looked like a reddish-brown jacket, as what I can recall. It was evening. It was raining and wet. It might have been even a sportcoat that was just wet. And they stood by the window of the car, which I rolled down.

"*Q.* All right, did you have an opportunity to observe the way this person walked?

"*A.* It was very unsteady and unsure. And—the person that just wasn't very well would walk like that.

"*Q.* And did you—did this person get close enough to you that you could observe his breath?

was intoxicated.[3] Other aspects of the officer's testimony, however, indicate that Jablonic had conveyed his uncertainty to the officer as to whether or not the driver was intoxicated. The officer's own testimony indicates that he went to the defendant's residence to investigate the defendant's condition, not to arrest the defendant. Thus in response to the question as to what was the officer's "mental intent, when you went into the house, to have him arrested for drunken driving," the officer answered,

"Well, it was my mental intent to go in the house and determine if he was in his bedroom, and what condition he was in, and whether or not he had anything to drink prior to leaving where the accident or the incident took place, until the time he got into bed. It was my intent to investigate it up to that point and make a determination."

It was only after making the warrantless entry into the home, observing the defendant "wringing wet," seeing in the bedroom defendant's clothes which matched the clothes Jablonic described and smelling alcohol that the officer himself concluded he had sufficient information to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant and decided to arrest the defendant.

Although the majority states that the circuit court reached "the conclusion that Jablonic conveyed the definite impression that the driver was intoxicated" (*supra*,

"*A*. No. They remained outside the vehicle. I did roll down the window. I conversed with the person. But there was no opportunity to smell his breath."

[3] Officer Daley testified as to his conversation with Jablonic as follows:

"*Q*. Do you recall whether or not he [Jablonic] said anything about this individual being under the influence?

"*A*. Yes, he had a definite opinion about that.

"*Q*. What did he tell you?

"*A*. He said the man was very obviously intoxicated."

p. 324), nowhere in the record did the circuit court state such a conclusion or even hint it reached such a conclusion. The circuit court's only reference to Jablonic's testimony is a reference by the circuit court to its notes which quote Jablonic as telling the officer that the driver was either sick or intoxicated. If any conclusion of the circuit court might be gleaned from the record as to the circuit court's finding of credibility as to Jablonic's or the officer's version of what Jablonic told the officer, and I do not know that any can be, it is that the circuit court relying on its notes concluded that Jablonic offered two explanations to the police officer for the driver's conduct—intoxication and illness. The most appropriate construction of the record is, however, that the circuit court concluded that it need not decide which witness to believe because whichever witness it believed the evidence was adequate to establish probable cause.

The majority seeks to bolster its conclusion that the officer had probable cause by relying on the officer's testimony as to what the daughter and the wife said when the officer entered the house. The daughter was not present to testify. The wife, without objection, related the daughter's version of what had happened, and the wife's testimony contradicts the officer's. The circuit court expressly avoided having to determine whose testimony it believed, the wife's or the officer's, and therefore the majority cannot use the officer's disputed testimony to bolster its conclusion.

Although the subjective conclusions of the police officer concerning the existence of or lack of existence of probable cause do not bind a court, the officer's apparent decision in the case at bar that the eye-witness furnished information sufficient to warrant further investigation but did not furnish information sufficient to lead him to believe that the defendant probably committed the offense of driving while under the influence of an intoxicant has some weight in this court's independent determination

of whether the information relayed to the officer was sufficient. Instead of saying that he intended to arrest the defendant but that he would have refrained from making the arrest if he found that the defendant was not intoxicated, the officer concluded on the record that it was his "intent to investigate . . . and make a determination." The majority cannot, try as it will, change the officer's words.

On the basis of the record in this case, I conclude that the state did not present sufficient facts to prove that information in the officer's possession was sufficient to satisfy the constitutional standard of probable cause. I conclude that when the officers entered the residence, they could only suspect that the defendant may have been the driver and that the driver may have been under the influence of an intoxicant. Reasonable suspicion (that is, ample factual justification falling short of what is required to support arrest or search) may be sufficient to justify further investigation, and in some situations, to justify a stop but it is not sufficient to justify a warrantless arrest. *Brown v. Texas*, 443 US 47, 51 (1979); *Terry v. Ohio*, 392 US 1, 22 (1968); *Wong Sun v. United States*, 371 US 471, 479 (1963); *State v. Cheers*, 102 Wis. 2d 367, 386–87, 306 N.W.2d 676 (1981); *Bies v. State*, 76 Wis. 2d 457, 465–66, 251 N.W.2d 461 (1977).

The majority opinion, in the section entitled probable cause, discusses the government's interest in eradicating drunk driving. *Supra*, pp. 333–335. The relevance of this discussion is not readily apparent. First, granting the police the power that the majority does in this case "does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment." *Delaware v. Prouse*, 440 U.S. 648, 660 (1979). The contribution to highway safety of allowing warrantless arrests in the home of persons who are reported to have driven erratically and who are described as drunk

or sick and who caused no damage to property or person is marginal at best.

Second, if the police officer had probable cause to make the arrest, the government's interest and the seriousness of the offense are irrelevant. If the police officer did not have probable cause to arrest, the arrest is unconstitutional and the government's interest and the relative seriousness of the offense are irrelevant. If the majority's discussion of the government's interest is the majority's way of saying that the seriousness of the offense is a factor for the police and the courts to consider in determining probable cause, the majority is making a dramatic change in the law of probable cause and is establishing a balancing, sliding scale test that would be difficult for both police and courts to comprehend and apply. 1 LaFave, *Search and Seizure*, sec. 3.2(a), pp. 450–58 (1978).[4]

[4] In determining probable cause there is no balance or weighing of the gravity of the public concerns served by the arrest and the severity of the interference with individual liberty. The balance has been made by adopting the requirement of probable cause. As the United States Supreme Court has said, "The requisite 'balance' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

The majority at one and the same time appears to negate and to inject a balancing test in determining probable cause. The majority says at *supra*, p. 327 that "although the State must prove the existence of both probable cause and exigent circumstances, *negating any implication of adherence to a mere balancing test*, the progeny of Fourth Amendment case law demonstrates that reasonableness occupies a prominent position in search and seizure analysis." (Emphasis supplied.) The progeny to which the majority refers are *Brown v. Texas*, 443 U.S. 47, 50–51 (1979), and *Bies v. State*, 76 Wis. 2d 457, 466, 251 N.W.2d 461 (1976) (quoting *Browne v. State*, 24 Wis. 2d 491, 507, 129 N.W.2d 175 [1964] cert. denied, 379 U.S. 1004). These cases involve an investigation or a stop which requires something less than probable cause. An investigation and a stop may be justified even if there

Exigent circumstances. Even if there is probable cause to believe the defendant has committed a *felony*, a warrant is required to enter a home unless exceptional circumstances are present which justify a warrantless entry. *United States v. Johnson*, — U.S. — (June 21, 1982); *Payton v. New York*, 445 U.S. 573 (1980); *Laasch v. State*, 84 Wis.2d 587, 267 N.W.2d 278 (1978). *Payton* and *Laasch*, upon which the majority relies, are authority only for the proposition that a warrantless arrest in a home may be permissible under exigent circumstances if the officer has probable cause to believe a *felony* has been committed. These cases are not authority for a rule that a warrantless arrest can be made in a home under exigent circumstances if the crime is a misdemeanor or if the offense is a civil traffic offense. The majority cannot assume that the *Payton* and *Laasch* rule is automatically applicable to this case. The issue which must be decided, not assumed, is under what circumstances, if any, is a warrantless entry in a home at night to effect an arrest for violation of a civil statute constitutional? Does the government's interest in enforcing the civil law and collecting a forfeiture ever

is no probable cause as long as there is "mere 'reasonable suspicion.'" *Dunaway v. New York*, 442 U.S. 200, 211 (1979). Reasonableness in the probable cause context revolves around whether the officer has *reasonable* grounds to believe that the defendant probably committed a crime. Reasonableness in the context of an investigation or stop involves balancing the gravity of the state's interest and the nature of the invasion of the privacy of the person. The majority's shifting back and forth between the balancing test justifying an investigation or stop and the concept of probable cause justifying a search or an arrest may very well explain why the majority reaches the conclusion it did in this case that the intrusion in the defendant's home and his arrest were constitutional.

The court of appeals used a balancing test in this case to determine exigency, not in the issue of probable cause. See note 5 *infra*.

outweigh an individual's expectation of privacy in his or her home?

Even if I were to assume that the *Payton-Laasch* rule is automatically applicable to this civil forfeiture case, I conclude the record is not adequate to find exigent circumstances.

The exigent circumstances doctrine, like all exceptions to the warrant requirement, must be viewed as a narrow exception to the protections of the fourth amendment. In *McDonald v. United States*, 335 U.S. 451, 456 (1948), the Court said: "We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that cause *imperative*." (Emphasis added.) See also *Laasch v. State*, quoted *supra* at page 3 of this dissent.

Although the United States Supreme Court has on several occasions spoken of exigent circumstances, the Court has not clearly defined what are exigent circumstances or established standards to measure the existence of such exigent circumstances. In this case, the circuit court appeared to conclude that the exigency arose out of hot pursuit and the need to preserve evidence of intoxication. The majority, on the other hand, identifies three exigent circumstances, that is, three urgent circumstances that make resort to the warrant process impracticable: (1) the need to prevent the offender's escape (hot pursuit); (2) the need to prevent physical harm to the offender and the public; and (3) the need to prevent the destruction of evidence.

The majority opinion does not establish standards by which the existence of the exigent circumstances are to be tested. For example, the majority does not explain whether the test for a valid warrantless entry under the exigent circumstances doctrine is a subjective one, an objective one, or both. In *State v. Prober*, 98 Wis. 2d

345, 365, 297 N.W.2d 1 (1980), the court adopted a two-step analysis (subjective and objective) for application of the emergency doctrine, an exception to the warrant requirement which is similar to the exigent circumstances doctrine. Under *Prober*, the warrantless search is invalid unless the officer is actually motivated by the perceived emergency, that is, to render aid or assistance (subjective test). Second, "even though the requisite motivation is found to exist," the warrantless search is invalid unless a "reasonable person under the circumstances would have thought an emergency existed" (objective test).

If the *Prober* two-step analysis for the emergency doctrine is not applicable to the exigent circumstances doctrine the majority ought to tell us why.

This case cannot meet the *Prober* subjective test. The officer did not testify that he believed he had to arrest the defendant immediately in order to prevent the defendant from escaping or in order to protect the defendant or the public from the danger of the defendant driving another automobile that night. The officer does refer to the fact that alcohol dissipates with the passage of time. But the officer said that his subjective motivation was to investigate immediately, to determine if the defendant was drunk. The officer did not testify that he believed he had to arrest the defendant immediately to preserve the evidence. He said he went into the house to determine whether the defendant was drunk and if so he would then attempt to preserve the evidence.

This case also cannot meet the *Prober* objective test of exigent circumstances.[8] The essence of the exigent cir-

[8] In applying the objective standard, federal and state courts have, according to the commentators, taken one of two approaches in attempting to articulate the facts which bear on the determination of exigent circumstances: the checklist approach articulated in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en

cumstances doctrine is the degree of urgency to make the arrest or search created by the exigency and the amount of time it would take to obtain a warrant.

The warrantless entry in this case cannot be justified as necessary to prevent the defendant from escaping arrest or to prevent physical harm to the driver or to the public. The police had the defendant's name and address. There is nothing in the record to indicate that the police thought he would leave the jurisdiction or would not be available for arrest unless he was pursued and arrested immediately. The majority speculates, without anything in the record supporting this speculation, that the defendant (whose car was in the field and who, as the police officers found out when they knocked on the door, was in

banc) or the totality of the circumstances test. See Harbaugh and Faust, *"Knock on Any Door"—Home Arrests after Payton and Steagald*, 86 Dick. L. Rev. 191, 224-25 (1982); Donnino and Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90 (1980); 2 LaFave, *Search and Seizure*, sec. 6.1, pp. 388-95 (1978).

Judge Gartzke, writing for the court of appeals, used a balancing test to determine whether the exigency justified the intrusion. He assumed that this case involved a misdemeanor and concluded that although there was urgency to avoid destruction of evidence, the urgency in this case was not sufficiently great to justify a warrantless arrest in the home. He noted that the "misdemeanor" in this case was not a grave offense. The defendant had not injured any person or property. The defendant's wife and daughter were in no danger. The defendant was in no danger; he was upstairs in bed. An intrusion by the police into a bedroom at night is a serious intrusion on privacy. Entry into the home is ordinarily afforded the most stringent fourth amendment protection. Judge Gartzke's approach of looking at the entire case and balancing the government's need for immediate police action and the defendant's interest in privacy in the home is interesting and worthy of discussion and consideration. It also seems to fit into the majority's keen interest in balancing and reasonableness. Unfortunately the majority ignores the approach of the court of appeals.

bed) had to be arrested immediately to prevent him from driving another car. The "threat to safety" exception must be limited to situations where the officer has reasonable factual justification to believe the defendant intends to drive again. Without this limitation, in every case involving probable cause to believe that the person was driving under the influence, the police would be justified in making a warrantless entry into the home to arrest the person.

The threatened destruction or removal of evidence presents a more difficult issue of exigent circumstances. It is beyond question that alcohol "disappears" over a period of time and that the evidence of intoxication will be destroyed by the passage of time. But neither the record nor the majority opinion describes the degree of urgency to make the arrest, that is, how long a time period may elapse before the alcohol has disappeared, and the amount of time it would take to obtain a warrant in the city of Madison at 9:30 at night.

Drugs can be flushed down a toilet in seconds. Money or bloody clothes can be burned within minutes. When we talk about "destruction" of the evidence of intoxication we are talking about hours.

Sec. 345.24, Stats. 1977, indicates that it may take up to four hours to allow an intoxicant's blood alcohol content to metabolize to a "safe" level. Sec. 885.235(3), Stats. 1977, states that chemical tests performed within two hours of the event to be proved are given prima facie effect without expert testimony; tests performed more than two hours after the event to be proved are admissible as evidence if expert testimony establishes its probative value and prima facie effect. Thus police can perform the test more than two hours after the event and still have acceptable evidence to present in court. In *State v. Bentley*, 92 Wis.2d 860, 286 N.W.2d 153 (Ct. App. 1979), a blood sample was taken from the accused

three and a half hours after the accident, and the results were apparently damaging to the accused's position. Sec. 885.235(3) was amended in 1982 to provide that samples taken within *three* hours are given prima facie effect without expert testimony; tests not taken within three hours after the event are admissible only if expert testimony establishes their probative value and prima facie effect. See ch. 20, sec. 1816(c) and (e), ch. 184, sec. 5, Laws of 1981.

In this case the police zeroed in on the identity of the defendant in about one half hour after the event to be proved. It is up to the state to introduce evidence that resort to the warrant process was impracticable because the warrant and any test for intoxication would come too late. Yet the state introduced no such evidence. Nor are there scientific facts or facts relating to the practice in Dane County as to the issuance of warrants of which this court might take judicial notice to justify the conclusion that a reasonable officer might reasonably have believed that he had to preserve the evidence from destruction and had no time to get a warrant. Because the state has not met its burden of showing that its warrantless entry was "imperative," I would hold that the circumstances were not exigent.

Accordingly, I would affirm the decision of the court of appeals and remand this case to the circuit court to determine the issue of consent.

To preserve the federal and state constitutional guarantees of the sanctity of the home against the knock on the door in the middle of the night by government officers who do not have a warrant issued by a judicial officer, I dissent.

I am authorized to state that Justice NATHAN S. HEFFERNAN joins this dissent.

COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 26 1981

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

No. 80-1686

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD WELSH,

Defendant-Appellant.

NOTICE
This opinion is subject to further editing. If published the official version will appear in the bound volume of the Official Reports.

APPEAL from the order of the circuit court for Dane county: MARK A. FRANKEL, Judge. Vacated and remanded.

GARTZKE, P.J. Edward Welsh refused to take a breath test required by sec. 343.305(2), Stats., following a warrantless arrest in his home for violating sec. 346.63(1), Stats., operating a motor vehicle while under the influence of an intoxicant. A refusal hearing resulted in an order revoking his operating privilege from which defendant appeals. Prior to the refusal hearing, defendant challenged the validity of his arrest. At the close of the evidentiary hearing, the trial court determined that it was unnecessary to decide whether the police entered defendant's home with consent, because exigent circumstances justified the arrest. We disagree and remand for findings on the consent issue.

The facts prior to the officer's arrival at defendant's home are undisputed. A witness testified that he saw defendant's car operate erratically and leave the road about 8:30 p.m., April 24, 1978. The witness stopped and defendant asked him for a ride home. When the witness refused, defendant walked away and the witness stayed at the scene. Another person called the police. About five minutes later Officer Daley arrived. The witness told Daley what he had seen and that he thought defendant was possibly under the influence. Daley checked with the Motor Vehicle Department and learned that the car was registered to defendant. Daley and another officer arrived at defendant's home about 9:00 p.m. Daley testified he went to the house to arrest defendant and that he knew alcohol dissipates from the body with time.

Officer Daley testified that he and the other officer were admitted into the house, that defendant's wife advised Daley that defendant had stumbled into the house highly intoxicated and was upstairs in bed and that she told Daley she was concerned about the defendant's alcoholic problem and that "something has to be done." Daley entered the upstairs bedroom where he found and arrested defendant.

Defendant's wife testified that she was upstairs when

the police arrived and that she told the officers only that her husband was upstairs. She did not know what happened at the door when the police knocked but related the version given to her by her daughters. The daughters' story, as related by Mrs. Welsh without objection, is perhaps ambiguous. Officer Daley testified that defendant's daughter answered the door, opened it, said, "He is upstairs," pointed to the stairway, and allowed the officers to pass. Daley testified that Mrs. Welsh came out of the kitchen and gave her consent to the officers to go upstairs.

The trial court found that the officers arrived at defendant's home within ten minutes after he left the scene of the accident and that exigent circumstances existed for entering defendant's home without a warrant to arrest him. In the trial court's view, the exigency arose out of hot pursuit and the need to preserve evidence of intoxication which could be lost because alcohol is dissipated from the body with the passage of time.

In the absence of consent or exigent circumstances, entry into a home to make an arrest is unreasonable under the fourth amendment to the United States Constitution unless done pursuant to a warrant. Steagald v. United States, ___ U.S. ___ (decided April 21, 1981); Payton v. New

York, 445 U.S. 573, 583 (1980) ("Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" where no exigent circumstances).

What constitutes exigent circumstances or consent is a mixed question of fact and law. The factual basis for the court's finding of exigent circumstances is not substantially disputed. The conclusion that exigency existed is a question of law. We are not bound by the trial court's conclusion of law. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

Exigent circumstances may permit officers to make a valid warrantless arrest of a suspect in his home. In Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), an armed robbery suspect fled into a house. The Supreme Court held that exigent circumstances justified a warrantless police entry five minutes later "to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them." 387 U.S. at 298. In United States v. Santana, 427 U.S. 38 (1976), when police attempted to arrest a narcotics dealer in the doorway of her home, she retreated into the hallway and the officers pursued and arrested her. The Supreme Court held that the

fact that the pursuit ended almost as soon as it began did not render it less than a "hot pursuit," and the realistic expectation that any delay would result in the destruction of evidence justified the warrantless entry and arrest. 427 U.S. at 43.

The ultimate test is whether the entry and arrest were reasonable. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37.

The need to search defendant's home to preserve evidence was low compared to the interest invaded by the search. A violation of sec. 346.63(1), Stats., while serious, is a misdemeanor rather than a felony because it is not punishable by imprisonment in the Wisconsin state prison. Secs. 346.65(2) and (3) and 939.60, Stats. There is no evidence that injuries resulted from this single-car accident or that defendant was armed, violent or dangerous to himself or others after he left his car. Having arrived at his family home, whatever risk arose from his apparent intoxication was substantially reduced. There is no evidence that his wife or daughters needed help.

The privacy of the home is among our highest values. Invalidating a warrantless arrest after a warrantless entry, the Wisconsin Supreme Court emphasized that "one's home is entitled to special dignity and sanctity." Laasch v. State, 84 Wis.2d 587, 594, 267 N.W.2d 278, 282 (1978). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Payton, 445 U.S. at 589-90, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

The prosecution relies on State v. Bentley, 92 Wis.2d 860, 286 N.W.2d 153 (Ct.App. 1979), which held that where there was probable cause to believe that a driver was guilty of the intoxicated use of a motor vehicle, the fact that blood rapidly metabolizes alcohol was an exigency which justified taking a blood sample from the driver without his consent. Bentley relied on Schmerber v. California, 384 U.S. 757 (1966). Schmerber held that if delay in obtaining a warrant threatens the destruction of evidence of a criminal offense because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, a warrant is unnecessary to take blood from the arrested person in a hospital. 384 U.S. at 770-71.

Bentley and Schmerber, supra, do not apply. The defendant in Bentley was charged with two counts of homicide and three counts of injury by intoxicated use of a motor vehicle, his home was not invaded without a warrant, and the exigency was sufficiently great in the view of the officers as to require forcibly taking a blood sample in a hospital. The defendant in Schmerber was involved in an accident in which he and a companion were injured and his home was not invaded. Welsh, on the other hand, was involved in a single-car accident with no apparent injuries, his home was invaded and the officers only requested that he submit to a blood alcohol content test.

We hold that the warrantless entry and arrest of defendant in his home was unreasonable and violates the fourth and fourteenth amendments to the United States Constitution, unless entry was gained by consent.

A warrantless entry of a home is valid if permission to search is obtained from a person who possesses common authority or other sufficient relationship to the premises or property. United States v. Matlock, 415 U.S. 164, 172 (1974). Because consent is an undecided issue, the trial court's findings are inadequate. We remand for a finding by the trial court

whether the officers entered the defendant's home with permission.[1]

By the Court.--Order revoking defendant's Wisconsin driver's license is vacated and the matter is remanded for further findings consistent with this opinion.

Inclusion in the official reports is not recommended.

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[1] Appellant moved to strike as unsupported by the record a portion of the state's brief relating to the circumstances of the officers' entry. Because we have remanded for findings on the consent issue, it is premature for us to treat the issues raised by appellant's motion. The motion is denied for that reason.

EAST TEN-O

STATE OF DISPOSITION

Uniform 1973-859

STATE OF WISCONSIN — COURT: COUNTY OF DANE — CITY MADISON

STATE of WISC. vs. Defendant and on 04-24 1978 at 849 AM (PM) Violation — Date No. — Time No.

Name-First — Middle Initial — Last: LOWARD G WELSH

Address (Residence) 7158 TREE LN — Post Office MADISON — State WISC — Zip

Birthdate 09-02-33 — Driver's License — State

Veh. Plate YE 1289 — Yr. 78 — State WISC — Make BUICK — Type PC

Trailer Plate — Yr. — State — Make — Type

Accident Yes — Arresting 342.62 UK 9 — 10 Violation

M P H: Act 1 — Legal 1 — Over — Describe violation: OPERATING MOTOR VEHICLE WHILE INTOXICATED

On Hwy/Street: 7200 MOORE PT

At: WEST POINT RD

County: DANE — City/Village/Town: MADISON

Officer's Signature: Richard J Dorn — Badge No. 1834 — Dept. MADISON POLICE

YOU ARE HEREBY NOTIFIED TO APPEAR IN THE ABOVE NAMED COURT

Chem Test — Refer

ON AUG 24 1978 AT 11:00 (AM) (PM)

Located at: CITY COUNTY BUILDING

Other

Operating as: Operator — Chauf — School Bus Op

Driver Description: Sex M Race W Eyes — Hair — Wt. — Ht.

ACCIDENT: Fatal — PI — PD — HIGHWAY: Type — Sys — Num — Lanes 4

MVD-4018-78 (1) Wisconsin Uniform Citation and Complaint s. 345.11 Statutes

4

080-2141/7781

12

STATE OF WISCONSIN, Plaintiff,

vs.

EDWARD G. WELSH, DOB 9/2/33
7158 Tree Lane
Madison, Wisconsin, Defendant.
Address

CRIMINAL COMPLAINT & SUMMONS

James Joachim, being first duly sworn, on oath says that on April 24, 1978, at the City of Madison, in said County, the defendant did: unlawfully and intentionally operate a motor vehicle while under the influence of an intoxicant; contrary to Section 346.63(1)(a) of the Wisconsin Statutes; and upon conviction may be imprisoned not less than five days, nor more than one year, and in addition may be fined not more than $500.00;

contrary to Sec. 346.63(1)(a), Wisconsin Statutes, and prays that said defendant be dealt with according to law; and that the basis for the complainant's charge of such offense is:

*1) FACTS: On April 24, 1978, at approximately 8:49 p.m. Madison Police Officer Daley was dispatched to the area of Westfield Place and Mineral Point Road, City of Madison, Dane County, Wisconsin, with reference to a vehicle driving on the cemetery. Upon arrival at said location, Daley states that he contacted Randy Jablonic, who stated that he was driving on Mineral Point Road when he observed a vehicle proceeding inbound on
(Continued on reverse side.)

*Subscribed and sworn to before me

James Joachim
Complainant

Mary Beth Keppel
District Attorney

**Approved for filing Mary Beth Keppel
District Attorney

SUMMONS

STATE OF WISCONSIN, Plaintiff,

vs.

EDWARD G. WELSH, Defendant.

THE STATE OF WISCONSIN TO SAID DEFENDANT:

The original of the above Complaint having been issued, accusing the defendant of committing the crime of OMVWI, contrary to Sec. 346.63(1)(a).

You are therefore, summoned to appear before the Judicial Court Commissioner of Dane County at the Courthouse in the City of Madison to answer said Complaint, on March 7, 1980 at 11:00 a.m. and in case of your failure to appear, a warrant for your arrest may be issued.

Dated 2/25/80.

Mary Beth Keppel
District Attorney

No CR-CX (Adopted 1970) CRIMINAL COMPLAINT & SUMMONS Section 968.04

continue to cross the median and drive onto the [illegible] Memorial Gardens Cemetery grounds for approximately 150 feet. Jablonic stated that he observed the driver of this vehicle, later identified as Edward G. Welsh, exit the vehicle and stumble as if he was intoxicated. Jablonic stated that Welsh asked him if he would not call the police, and Welsh then left the cemetery and staggered off in a north-easterly direction towards Tree Lane. Jablonic described Welsh as being a white male about 40 years old, 5'8" tall, and stated that Welsh was wearing a tan leather coat and light pants. Jablonic also stated that the vehicle Welsh was driving was a 1974 Buick with Wisconsin license number YE1289. Daley states that he ran the above information through the Department of Motor Vehicles which indicated that the above vehicle was registered to the defendant, and that the defendant's address was 7158 Tree Lane. Daley stated that he then proceeded to that location where he contacted the defendant's wife, Patricia Welsh, who stated that her husband, Edward Welsh, just minutes earlier, stumbled into the house, highly intoxicated, and that he just went straight to bed. Daley stated that he then contacted the defendant, who fit the general description previously given, and was wearing clothing that matched the description which was supplied by Jablonic. Daley stated that the defendant was then arrested for operating a motor vehicle while under the influence of an intoxicant and issued a citation for the same. (A copy of the citation is incorporated in this complaint.)

**2) AND THAT THIS COMPLAINT IS BASED ON: Information and belief of your complainant, an Officer with the Madison Police Department, who has read the reports of Officer Daley, whom your complainant believes to be truthful and reliable based upon past professional contacts and whose reports have always proven to be truthful and reliable. Your complainant further believes the statements of Randy Jablonic to be truthful and reliable in that he is a citizen informant and eye witness to the above offense. Your complainant further believes the statement of Patricia Welsh to be truthful and reliable in that she is a citizen informant.

SUMMONS

DANE COUNTY CIRCUIT COURT
(Criminal & Traffic Court)

STATE OF WISCONSIN

vs.

EDWARD G. WELSH

State of Wisconsin }
City of Madison } ss.
County of Dane }

I hereby certify that at _____

o'clock in the (A)(P).M., on the _____

y of _____, 19___, at the

_____ of _____,

ounty of _____, State of Wisconsin,
erved the within summons on the within named
efendant by delivering to and leaving with him
personally, a true and correct copy thereof, and
also certify that at the time of said service I
ndorsed upon the copy so served, the date and
ce upon which same was served and signed my
me thereto, and added thereto my official title.

_____

_____

ES:
Service .....$_____
Travel .....$_____
Total .....$_____
ed this _____ day of _____

_____.

Clerk of the Circuit Court
Madison, Wisconsin

_____

RECEIVED
NOV 18 1981
Clerk of Supreme Court, Wis.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS, DISTRICT IV, THAT VACATED AND REMANDED THE ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE MARK A. FRANKEL, PRESIDING.

BRIEF AND APPENDIX OF PETITIONER

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

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EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION
OF THE COURT OF APPEALS, DISTRICT IV,
THAT VACATED AND REMANDED THE ORDER
OF THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE MARK A. FRANKEL, PRESIDING

BRIEF AND APPENDIX OF PETITIONER

ISSUES

1. Should an appeal from an order under sec. 343.305, Stats., to suspend a defendant's operating privileges for failure to submit to a breathalyzer test be decided by a panel of three court of appeals judges or one court of appeals judge?

This appeal was decided by one court of appeals judge.

2. Did the police have probable cause to arrest and did the facts present exigent circumstances so that the warrantless arrest of the defendant in his home for operating a motor vehicle while under the influence of

intoxicants was valid under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution?

Trial court answered: yes.

Court of appeals answered: no, because the case did not present exigent circumstances.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state believes that oral argument would be helpful in discussing the application of relevant fourth amendment law. The state believes that publication is warranted in order to provide a statement on the correct application of the fourth amendment law.

STATEMENT OF THE CASE

Edward Welsh, the defendant, was arrested at his home on April 24, 1978, and issued a citation for operating a motor vehicle while under the influence of intoxicants (4; 13:27, 38). After being arrested, the defendant was taken to the police station where he refused to take the breathalyzer test (5; 10:5, 8).

On September 5, 1980, a hearing was held in the circuit court to determine whether the defendant's refusal to take the breathalyzer test was reasonable (10:3). At the refusal hearing, the defendant's attorney argued that the arrest was invalid and that as a result the trial court

had no jurisdiction and the refusal to take the breathalyzer was reasonable (10:11, 24).

The court ruled that it was bound by its decision in an earlier hearing that the arrest was valid (10:39). At the earlier hearing, the court had concluded that the warrantless arrest of the defendant in his home was valid because the police had probable cause to believe that the defendant had committed a crime and exigent circumstances existed because it was necessary to take the breath sample to avoid dissipation of the alcohol (14:34, 35). At the conclusion of the refusal hearing, in addition to finding that the arrest was valid, the court concluded that the refusal to take the breathalyzer test was unreasonable (10:45-46). The court therefore ordered suspension of the defendant's operating privileges for the statutory period of sixty days (10:46).

The defendant appealed from the circuit court order suspending his license (11). In the notice of appeal, the defendant stated that the appeal was within sec. 752.31(2), Stats. With this statement, the defendant was claiming that the appeal should be decided by one judge of the court of appeals.

On May 26, 1981, Judge Gartzke issued the one judge decision of the court of appeals (Pet. App. 101-08). In the decision, Judge Gartzke concluded that the warrantless arrest of the defendant in his home was invalid because the state had not established the existence of

exigent circumstances. Judge Gartzke therefore vacated the circuit court order and remanded the case to the circuit court for further findings in which the circuit court was to determine whether the entry into the defendant's home was made with consent.

The State of Wisconsin petitioned for this court to review the decision of the court of appeals; and this court granted the state's petition.

FACTS

In an evidentiary hearing held on July 14, 1980, Randy Jablonic testified that between 8:30 and 9:00 p.m. on April 24, 1978, he was traveling east on Mineral Point Road in Madison when he saw a car in front of him that was driving extremely cautiously, first traveling very, very slowly and then a little faster (13:8, 16). Jablonic saw the car go from side to side on the road; and as the car approached a boulevard near West Towne shopping center it headed for the median where there was a sign telling drivers to stay to the right (13:9). Jablonic said that although the car was not traveling at an excessive rate of speed, it was weaving back and forth (13:9). Jablonic saw the car veer to the left lane, and when a car approached from the east the car in front of Jablonic veered left and drove into a cemetery, or open field, where the car stalled or got stuck (13:9). According to Jablonic, it was raining, the ground was wet and the visibility was bad

(13:8, 9). Jablonic drove past the defendant's car, turned around and pulled up behind the car to keep it from returning to the road (13:10). Jablonic stopped another car and asked the driver to call the police (13:10). When Jablonic saw the defendant drive further onto the grassy area, Jablonic drove to a side road in fear that the defendant would try to come out at that point (13:10). Jablonic saw the defendant leave his car and head northeast; and shortly thereafter, the defendant came to Jablonic's window (13:11). According to Jablonic, the defendant had a wet leather jacket and the defendant's walk was unsteady and unsure (13:11). After standing by Jablonic's truck for quite some time, the defendant asked if Jablonic would give him a ride home (13:11). Jablonic said no, that they had better wait for help to get the car out (13:12). According to Jablonic, the defendant then broke into a slurred conversation: "You wouldn't get the cops" (13:12). Jablonic said the defendant was concerned that Jablonic would call the cops (13:12). The defendant left and Jablonic watched him walk north and then east (13:12).

Jablonic testified that three to five minutes after the defendant had left the police arrived; and Jablonic told the officer that the defendant was very inebriated or very sick or not very much in possession of his faculties (13:13, 14). Jablonic told the officer that the defendant had taken off across the the field (13:14).

Jablonic explained that he had decided the defendant was inebriated because of the erratic motion of his car and the staggering and slurred speech (13:14). Jablonic pointed out the defendant's vehicle to the police (13:15).

Jablonic said that the total time from the beginning of the incident to the time the defendant left Jablonic's truck was, by far, fifteen to twenty minutes (13:22). Jablonic said that when the police arrived he went to them immediately and told them what had transpired (13:24). Jablonic said that his conversation with the police took less than five minutes (13:25).

City of Madison Police Officer Richard Daley said that at 8:49 p.m. he was dispatched to Westfield Drive on Mineral Point Road where he met Jablonic (13:27). Daley said Jablonic gave him information about an individual operating under the influence and Jablonic pointed out the car the person was driving (13:27). Daley ran a check on the license number on the car and was informed that it was registered to Edward Welsh of 7158 Tree Lane (13:28). Jablonic had pointed out the direction that the person had taken and it was toward Tree Lane (13:28-29). Jablonic described the incident he had observed and he described the defendant. Jablonic told Daley that the defendant was very obviously intoxicated and that he had seen the defendant driving the car (13:30). After spending less than five minutes with Jablonic, Daley proceeded directly to 7158 Tree Lane, which took less than one and one-half minutes

(13:30). Daley said that a week or two earlier he had visited that address of Edward Welsh for an alcohol-related disturbance (13:30-31).

Daley testified that he arrived at the address along with Officer Harless and they knocked on the door (13:31). Daley said that when the defendant's step-daughter opened the door they informed her that there had been an accident and that they suspected that the defendant had the accident and had run home (13:31). When they asked if they could speak with the defendant, the step-daughter said that he had just stumbled in and she allowed the police to come in (13:31, 32). Daley said the step-daughter opened the door and said the defendant was upstairs (13:32). According to Daley, as the police started up the stairs, Mrs. Welsh appeared and asked what was going on (13:33). The police told Mrs. Welsh that there had been accident and they strongly suspected that the defendant was involved and they wanted to speak to him because they thought he was probably under the influence of intoxicants (13:33). According to Daley, Mrs. Welsh said the defendant was in bed and showed the police where the bedroom was (13:33, 34). Daley said that both officers were in uniform (13:34).

On the way up the stairs Daley saw wet and muddy tracks going to the bedroom and in the bedroom he saw the defendant lying in bed with no clothes on and muddy pants next to the bed (13:37). Daley said they asked the

defendant to get up and put his pants on because they wanted to speak to him (13:37). According to Daley, the defendant needed help in getting his pants on and so the police had to hold him up (13:37, 39). Daley said that in speaking with the defendant they noticed that the whole room smelled of alcohol and that the defendant had a very heavy odor of alcohol about his person (13:37). Daley said that the defendant's speech was slurred and that the defendant and his wife and his step-daughter had all said that the defendant had not had anything to drink since entering the home (13:37). Daley said that when they were in the bedroom they informed the defendant that he was under arrest for operating under the influence of intoxicants (13:38). Daley explained that when an arrest is made for operating under the influence the police must get the person downtown as soon as possible for a breathalyzer test because the alcohol dissipates from the body after a certain period of time (13:38). Daley said that the defendant was issued a citation for driving while under the influence of intoxicants (13:40).

The defendant's wife, Patricia Welsh, testified that a half hour to forty-five minutes had elapsed from the time the defendant came home to the time the police arrived (13:50). She also denied that she told the police that the defendant was highly intoxicated (13:51).

ARGUMENT

I. IN THE COURT OF APPEALS THIS APPEAL SHOULD HAVE BEEN DECIDED BY A PANEL OF THREE JUDGES.

In the court of appeals this appeal was decided by one judge. The state submits that the appeal should have been decided by three judges.

Section 752.31, Stats., provides that, with the exception of those cases listed in subsection (2), the court of appeals shall sit in panels of three judges. Specifically, sec. 752.31, Stats., provides, in part:

> (1) Except as otherwise provided in this section, the court of appeals shall sit in panels of three judges to dispose of cases on their merits.
>
> (2) Appeals to or other proceedings in the court of appeals in the following types of cases shall be decided as specified in sub. (3):
>
> (a) Cases under ch. 799.
>
> (b) Municipal ordinance violation cases.
>
> (c) Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a).
>
> (d) Cases under ch. 51.
>
> (e) Cases under ch. 48.
>
> (f) Misdemeanors.

Pursuant to subsection (3) of sec. 752.31, Stats., the cases specified under subsection (2) shall be decided by one court of appeals judge, except that any

party on appeal or other proceeding may move that the case be decided by a three-judge panel.

In the instant case, the one judge who decided the appeal apparently felt that the case qualified as an exception to the three-judge requirement by meeting the specifications of sec. 752.31(2)(c), Stats., which provides for a one-judge appeal in cases "involving violations of traffic regulations, as defined in s. 345.20(1)(a)."

Section 345.20(1)(a), Stats., defines a traffic regulation as a provision in chapters 194 or 341 to 349 for which the penalty for violation is a forfeiture.

A forfeiture is "any penalty, in money or goods." See sec. 778.01, Stats.

The penalty for the unreasonable refusal to submit to a breathalyzer test is a suspension of the defendant's operator's privileges. See sec. 343.305(7), Stats. (1975). (The 1975 statutes are applicable to the instant case because the offense occurred in April, 1978, which was prior to the effective date of the major changes in sec. 343.305, Stats., that were made by ch. 193, secs. 7 and 8 of the Laws of 1977, which became effective on July 1, 1978.)

Therefore, the state submits that this case does not involve a traffic regulation because the unreasonable refusal to take a breathalyzer test does not result in a forfeiture; it results in suspension of the defendant's operator's privileges. Because violation of the refusal

law does not result in a forfeiture, the law is not a traffic regulation. Therefore, an appeal from an order to suspend the defendant's operating privileges in a refusal hearing is not an appeal in a case involving a traffic regulation. This means there is no authorization for a one-judge appeal; and in this case, the appeal should have been decided by a panel of three judges rather than one judge in the court of appeals.

It should be pointed out that a decision by this court that three judges should have decided this appeal may be of limited precedential value. Currently a bill is pending in the Legislature to provide that appeals in refusal hearings will be handled by one judge. The 1981 Assembly Bill 737 would modify sec. 752.31(2)(c), Stats., to provide: "Cases involving violations of traffic regulations, as defined in s. 345.20(1)(a), and cases under s. 343.305." The proposed bill would thus add the words "and cases under s. 343.305." A note accompanying the proposed change explains that it would clarify that cases under sec. 343.305 are also decided as specified in subsection (3) of sec. 752.31, Stats. (Pet. App. 109-11).

The state submits that, despite the implication to the contrary in the note accompanying the bill, the present statute does not specify that appeals from orders in refusal hearings should be decided by one judge of the court of appeals. The applicable statutes clearly show that orders in refusal hearings do not qualify as cases

involving traffic regulations or any other case specified in sec. 752.31(2) as being subject to decision by one judge of the court of appeals.

Because this appeal was decided by one judge rather than three in the court of appeals, the court of appeals' decision could be reversed on that ground alone and the case remanded for a decision by three judges. However, the state requests this court to decide whether appeals from orders in refusal hearings should be decided by one judge or three judges of the court of appeals; and, even if the court decides that three judges should decide the appeals, the state requests that this court go on to decide the arrest issue that is raised in this review. The state believes that this procedure is preferable to remanding the case to the court of appeals for decision on the arrest issue because that procedure would result in a second decision by the court of appeals and a possible second review in the supreme court, all of which would cost the state and the defendant additional expenses. The state believes that since the arrest issue is currently before the supreme court, it would be in the interest of judicial economy for the court to decide that issue.

II. THE WARRANTLESS ARREST OF THE DEFENDANT IN HIS HOME ON A CHARGE OF OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICANTS WAS VALID UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ART. I, SEC. 11 OF THE WISCONSIN CONSTITUTION BECAUSE AT THE TIME OF THE ENTRY INTO THE HOME THE POLICE HAD PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT HAD COMMITTED THE CRIME AND THE CASE PRESENTED EXIGENT CIRCUMSTANCES.

At approximately 9:00 p.m. on April 24, 1978, the police arrested the defendant in his home on a charge of operating a motor vehicle while under the influence of an intoxicant, a misdemeanor.

The trial court ruled that the warrantless arrest of the defendant was valid because the police had probable cause to believe that the defendant had committed the crime and there was no time to obtain a warrant because of the need to take a breath sample from the defendant before the dissipation of the alcohol in his blood (14:34-35).

The court of appeals disagreed with the trial court and said there was not sufficient exigent circumstances to permit the police to make a warrantless entry into the defendant's home to make the arrest. In determining whether exigent circumstances existed, the court of appeals noted that in State v. Bentley, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979), and in Schmerber v. California, 384 U.S. 757 (1966), the courts concluded that it was not necessary to get a warrant before obtaining

blood samples from the defendants because the blood rapidly metabolizes alcohol and there was not sufficient time to get a warrant. State v. Welsh, No. 80-1686 (Ct. App. May 26, 1981), at page 6 of slip. op. (Pet. App. 106). However, the court of appeals distinguished Bentley and Schmerber on the ground that in those cases people were injured in accidents involving drunken drivers, but in the instant case, no one was injured. See Welsh, slip op. at 7 (Pet. App. 107). The court of appeals concluded that because the defendant's crime was not serious enough, the warrantless entry into his home to arrest him was unreasonable. See Welsh, slip op. at 7 (Pet. App. 107).

The state submits that the court of appeals erred in finding the entry unreasonable; and that the error occurred because the court, in applying a balancing test, placed undue emphasis on the seriousness of the crime the defendant was believed to have committed.

The state believes that the warrantless, nonconsensual entry into a suspect's home to make an arrest is valid under the Fourth Amendment to the United States Constitution and under art. I, sec. 11 of the Wisconsin Constitution when the police possess probable cause and the case presents exigent circumstances. Whether exigent circumstances exist does not have to depend on the seriousness of the crime the suspect is believed to have committed. The same level of probable cause and the same

exigent circumstances can justify the warrantless, nonconsensual entry to arrest for a misdemeanor as to arrest for a felony.

A. The basic rule for justifying a nonconsensual entry into a suspect's home to make a warrantless arrest is probable cause plus exigent circumstances.

The basic rule in regard to arrest in a suspect's home is that, in the absence of an arrest warrant and in the absence of consent to enter, the police need probable cause to believe the suspect committed the crime and exigent circumstances in order to make a constitutionally valid arrest. Payton v. New York, 445 U.S. 573 (1980), and Laasch v. State, 84 Wis. 2d 587, 591-93, 267 N.W.2d 278, 281-82 (1978).

In Payton, the Court did not reach the question of what type of circumstances would justify a warrantless entry. 445 U.S. at 583. In Laasch, this court strongly implied that the warrantless arrest would have been valid if the state had proven that the arrest was made in hot pursuit, or that there was a threat to the safety of other persons, or that there was a risk that evidence would be destroyed, or that there was a risk that the suspect would flee if the police took the time to obtain a warrant. 84 Wis. 2d at 589, 267 N.W.2d at 280.

As noted in Laasch, one type of exigent circumstance that justifies a warrantless, nonconsensual

entry to make an arrest is the preservation of evidence. If there is a sufficient risk that the delay caused by obtaining a warrant will result in the destruction of evidence, a warrantless entry to make an arrest based on probable cause is constitutionally valid. See 2 LaFave, Search and Seizure, sec. 6.1 at 392-93 n. 86. In several cases, appellate courts have held that the warrantless entry to make an arrest was justified because a delay occasioned by obtaining a warrant created a serious risk that evidence would be destroyed. See United States v. Kulcsar, 586 F.2d 1283, 1285-87 (8th Cir. 1978); United States v. Campbell, 581 F.2d 22, 24-26 (2nd Cir. 1978); United States v. Flickinger, 573 F.2d 1349, 1354-57 (9th Cir. 1978); United States v. Bustamante-Gamez, 488 F.2d 4, 8-9 (9th Cir. 1973); United States v. Mapp, 476 F.2d 67, 74 (2nd Cir. 1973); United States v. Davis, 461 F.2d 1026, 1029-31 (3rd Cir. 1972); State v. Nagel, 308 N.W.2d 539, 541-44 (N.D. 1981), and cases cited therein; and State v. Decker, 119 Ariz. 195, 580 P.2d 333, 336 (1978).

In Payton, 445 U.S. at 588-89, and in Laasch, 84 Wis. 2d at 594-95, 267 N.W.2d at 282-83, the courts said that warrantless entries, whether to make an arrest or to execute a search, implicate the same interest and are governed by the same constitutional principles. Each case relied on principles in search cases to decide its arrest issues.

Therefore, it is appropriate in the instant case to look to two search cases which have held that the rapid metabolization of alcohol in the blood justifies warrantless seizure of blood samples. Schmerber, 384 U.S. at 770-71, and Bentley, 92 Wis. 2d at 864, 286 N.W.2d at 155. In Bentley, the court said: "Blood rapidly metabolizes alcohol after a person ceases drinking; thus creating an exigent situation." 92 Wis. 2d at 864, 286 N.W.2d at 155.

Therefore, the metabolization of alcohol in the blood creates an exigent circumstance that justifies a warrantless entry to make an arrest, if the police also have probable cause to believe the defendant committed the crime.

B. Exceptions to the warrant requirement are applied on a categorical basis.

The basic principle of the fourth amendment law is that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton, 445 U.S. at 586.

As to the arrest of a suspect in his home, an exception to the warrant requirement is recognized, and the seizure is valid, where the police have probable cause and exigent circumstances. See Payton and Laasch.

As with other exceptions to a constitutional requirement, the warrantless arrest exception is applied on

a categorical basis. The exceptions to the general fourth amendment requirements are recognized after "balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). However, this balancing test is conducted on a categorical basis, rather than on a case-by-case basis. The categorical application of the fourth amendment exception was noted in Camara, where the Court said: "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable unless it has been authorized by a valid search warrant.'" (Emphasis added.)

In Camara, in applying a balancing test to determine the reasonableness of the warrantless administrative searches, the Court looked to general policies and needs, not simply to the facts of the specific case before it.

In the instant case, the court of appeals erred in applying the balancing test only on the basis of the specific facts of the case. The court of appeals concluded that the risk of losing evidence in a misdemeanor case where no one was injured did not outweigh the defendant's right to privacy in his home.

The court of appeals therefore applied an incorrect analysis of fourth amendment law. The court should have looked to the categorical exceptions to the warrant requirement. The category of warrantless entry to

arrest based on probable cause and exigent circumstances justifies the arrest in this case.

The case-by-case approach used by the court of appeals in the instant case has been rejected by the United States Supreme Court. See Dunaway v. New York, 442 U.S. 200 (1979). In Dunaway, the police seized the defendant, took him to the police station and questioned him even though they did not have probable cause to arrest. In holding the seizure invalid because the police did not have probable cause, the court noted that there were few exceptions to the requirement that the police have probable cause to seize the person. The first exception was created in Terry v. Ohio, 392 U.S. 1 (1968), the stop and frisk case. Dunaway, 442 U.S. at 208-09. The Court said it has been careful to maintain the narrow scope of Terry. 442 U.S. at 210.

In Dunaway, the State of New York asked the Court to apply a balancing test on a case-by-case basis and to permit custodial interrogations upon a mere reasonable suspicion. 442 U.S. at 211. The state was not clear on all the factors it proposed for the balancing test, but some of the factors were the manner and the intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter. 442 U.S. at 211 n. 14.

In rejecting the state's proposed test, the Supreme Court said in 442 U.S. at 213-14:

> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that did not amount to technical arrests. But the protections intended by the Framers could all to easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." . . . A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.

(Footnotes and citations omitted.)

In New York v. Belton, ____ U.S. ____, 101 S.Ct. 2860, 2863 (1981), the Supreme Court reiterated its concern for a single, familiar standard to guide the police. The Court noted that the fourth and fourteenth amendment protections can be realized only if the set of rules governing them can be understood and applied by the police. The Court said in 101 S.Ct. at 2863:

> [T]he protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." LaFave, "Case-by-Case Adjudication" v. "Standardized Procedures": The Robinson Dilemma, 1974 Supreme Court Review 127, 142. This is because
>
> "Fourth Amendment doctrine, given force and effect by the exclusionary

> rule is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" Id., at 141.

In Belton, the Court adopted a rule that is fairly easy for the police to administer when the Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 101 S.Ct. at 2864 (footnotes omitted).

In a companion case to Belton, the Court in Robbins v. California, ___ U.S. ___, 101 S.Ct. 2841 (1981), again attempted to draw lines that will be fairly easy for the police to follow. The Court held that the automobile exception to the fourth amendment warrant requirement allows the police to open the trunk of the vehicle, but does not justify the search of closed, opaque containers found in the trunk unless the distinctive configuration of the container proclaims its contents. 101 S.Ct. at 2846, 2847.

In Belton and Robbins, the Supreme Court was criticized for establishing "bright line" rules. See Justice Powell, concurring in Robbins, 101 S.Ct. at 2847; and Justice Brennan, dissenting in Belton, 101 S.Ct. at 2866. But despite this criticism, these cases point out the importance of applying the exceptions to the fourth amendment warrant requirement on a categorical basis. The exceptions must be stated and applied in such a way that the policeman, faced with the need to make instantaneous decisions in the field, can correctly decide what action to take.

In terms of the instant case, the policeman faces a difficult enough task applying the categorical test. He must determine whether he has probable cause and whether exigent circumstances exist. However, that task has been simplified by the body of law already created. He has learned pretty well to recognize probable cause. As to exigent circumstances, the police officer must determine whether there is hot pursuit, a danger to others or a threat of destruction of evidence or of flight by the suspect. These are fairly objective criteria susceptible to yes or no answers.

However, the court of appeals has thrown in a new factor that greatly increases the difficulty of assessing the fourth amendment requirement. The court of appeals has required the policeman -- at the risk of violating the defendant's fourth amendment rights -- to consider a

balancing test in each case based on the severity of the crime and the harm done by the crime. In terms of the court of appeals' analysis in this case, how serious would the crime have to be to validate the warrantless entry? Must there be personal injury; or will property damage suffice to tip the balance in favor of immediate police action?

This question was answered by the Supreme Court in Dunaway, Belton and Robbins. The Supreme Court does not require the policeman to engage in such an intricate balancing act. The exceptions to the fourth amendment requirement are categorical rules created after balancing tests considered general policies, not the facts of specific cases. As noted by Justice White, in a concurring opinion in Dunaway, 442 U.S. at 219-20:

> As our prior cases hold, however, the key principle of the fourth amendment is reasonableness--the balancing of competing interests. . . . But if courts and law enforcement officials are to have workable rules, . . ., this balancing must in large part be done on a categorical basis--not in an ad hoc, case-by-case fashion by individual police officers. [Citations omitted.]

In the instant case, the proper test to determine whether the arrest was valid considers whether the police had probable cause to believe that defendant had committed a crime and whether exigent circumstances existed, that is, whether there was hot pursuit, a danger to others, or a threat of destruction of evidence or a threat of flight by

the suspect. Here, the police had probable cause and the threat of destruction of evidence by the alcohol metabolizing in the blood before the breathalyzer could be administered if time were taken to obtain a warrant.

The state contends that this categorical application of the warrant exception applies whether the suspected crime is a misdemeanor or a felony.

C. The fourth amendment does not draw a distinction between felonies and misdemeanors.

The court of appeals' opinion in this case implies the state must show different or more exigent circumstances to justify a warrantless, nonconsensual entry to make a misdemeanor arrest than to make a felony arrest.

The state believes this is incorrect. The same showing is required to justify the warrantless misdemeanor arrest as to justify a warrantless felony arrest.

The authority for a law enforcement officer to make an arrest is defined by sec. 968.07, Stats., which provides, in part:

> Arrest by a law enforcement officer. (1) A law enforcement officer may arrest a person when:
>
> (a) He has a warrant commanding that such person be arrested; or
>
> (b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or
>
> (c) He believes, on reasonable grounds, that a felony warrant for the

person's arrest has been issued in another state; or

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

Under sec. 968.07(1)(d), Stats., an officer may arrest a suspect on the basis of probable cause that the suspect has committed a crime. This applies to a misdemeanor as well as to a felony. The note to sec. 968.07, Stats., states that: "Sub. (1) increases the power of a law enforcement officer to arrest for all crimes when he has reasonable grounds to believe that a person has committed a crime." See ch. 255, sec. 63, Laws of 1969, and 42 Wis. Stats. Annot. at 35-36 (1971). The statute's reference to crimes includes misdemeanors as well as felonies. See Rickards v. State, 77 A.2d 199, 202 (Del. 1950).

Under sec. 968.07(1), Stats., the police officer can arrest a suspect for a misdemeanor if he has probable cause to believe the suspect committed the crime. The statute has eliminated the common law requirement that the misdemeanor be committed in the officer's presence to justify a warrantless arrest.

This court has ruled that within the limits of the fourteenth amendment, the law of Wisconsin determines the validity of a warrantless arrest. State v. Estrada, 63 Wis. 2d 476, 494, 217 N.W.2d 359 (1974).

Under sec. 968.07(1), Stats., a warrantless arrest for a misdemeanor is valid under the same

circumstances as a warrantless arrest for felony, that is, when the officer possesses probable cause. Therefore, unless the fourth amendment requires otherwise, in Wisconsin the arrest law for a misdemeanor is the same as for felonies.

Under the fourth amendment, the only limit on warrantless arrest is the same for misdemeanors as for felonies, that is, the police must possess probable cause. See 2 LaFave, Search and Seizure, sec. 5.1 at 231-32 and cases cited therein.

In a leading case on the application of the fourth amendment in misdemeanor cases, the court said in Street v. Surdyka, 492 F.2d 368, 371-72 (4th Cir. 1974):

> The constitutional restrictions on arrest are derived from the fourth amendment's prohibition of unreasonable seizures. Because the Supreme Court has interpreted the fourth amendment in light of the law that existed when the Bill of Rights was adopted, . . ., it might be argued that the fourth amendment incorporates the common law's restrictions on warrantless arrests for misdemeanors. But the Supreme Court has never given constitutional force to this element of the common law rule. In Bad Elk v. United States, 177 U.S. 529, 20 S.Ct. 729, 44 L. Ed. 874 (1900), the Court applied the common law rule but hinted that its restrictions could be relaxed by statute. Subsequent cases have focused entirely on the requirement of probable cause. . . . We do not think the fourth amendment should now be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence. The difference between felonies and misdemeanors, is no longer as significant as it was at common law.

> . . . Maryland courts have criticized the continued use of the common law rule as impractical and illogical and have invited the state legislature to adopt new rules. . . . Classifications based on other criteria could be both rational and practical. . . . We are most reluctant to adopt a constitutional interpretation that would impede reform in this area. The fourth amendment protects individuals from unfounded arrest by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

(Footnotes and citations omitted.)

Other appellate courts have also ruled that the fourth amendment does not distinguish between felony and misdemeanor arrests. See Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975); In the Matter of Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); and State v. Berker, 391 A.2d 107 (1978).

In City of Columbus v. Harrell, 18 Ohio App. 2d 149, 247 N.E.2d 770, 773 (1969), the court ruled that the state did not violate the fourth amendment when it authorized a police officer to arrest for a misdemeanor not committed in his presence. The court held the fourth amendment requires probable cause for arrest and no more for either a misdemeanor or a felony.

Therefore, in the instant case, the fourth amendment places no greater burden on the state to justify a warrantless arrest of a suspect in his home for a misdemeanor than it does for a warrantless in-home arrest

for a felony. In each case, the policeman needs probable cause and exigent circumstances. The gravity of the crime should not be considered unless it is relevant to establish a recognized exigent circumstance, such as a threat to others when the suspect is believed to have committed a violent crime.

The court of appeals did not take this approach. The court of appeals considered the gravity of the offense as an extra factor in assessing the validity of the arrest. This is incorrect for several reasons.

First, the fourth amendment requirements for misdemeanor arrest are the same as for felony arrests.

Second, the statutory requirements for warrantless arrests for a crime believed to have been committed in Wisconsin are the same for misdemeanors as for felonies.

Third, the court of appeals' approach places too great a burden on the policeman who is required to make instantaneous decisions. As noted by the United States Supreme Court in Dunaway and Belton, rules are needed that can be applied by the police with reasonable certainty. Requiring the police to weigh the relative weight of the specific crime and harm caused in order to determine whether a warrantless entry is valid is too great a burden. It is difficult enough for the officer to assess probable cause and exigent circumstances; but that can be

done on a categorical basis that provides adequate protection to the suspect.

Fourth, before the circumstances qualify as exigent, they must show either a danger to others or a threat to the loss of evidence or a threat of flight by the suspect. The warrant requirement is relieved in those situations because of the possible severe consequences of taking the time to secure the warrant. If the court of appeals approach were adopted, it would mean that in some cases -- probably in most misdemeanor cases -- the courts would be saying that threats to others or possible loss of evidence or the possible flight of the suspect would be acceptable risks and that the warrant requirement is a higher value. This means that the drunken driver would be wise to rush home because as long as he has not caused any injury or damage, the police must get a warrant before he can be arrested. This would frequently mean the state's case would be irretrievably lost because the alcohol content in the blood would have dissipated by the time a warrant was obtained.

The state believes this is unnecessary. The circumstances generally recognized as exigent -- i.e., hot pursuit, threat of injury, threat of the destruction of evidence or of the flight of the suspect -- are strict enough that the suspect is sufficiently protected by requiring the state show those circumstances to justify the warrantless entry, without also requiring the state to show

that the suspected crime was serious and that it caused injury or damage. Such a showing is not required by the fourth amendment and should not be required by this court.

D. In this case, the police possessed probable cause and exigent circumstances to justify the warrantless entry to arrest the defendant.

As argued by the state, and as established in Payton and Laasch, the warrantless entry to arrest is valid where the police have probable cause to believe the defendant has committed a crime and the circumstances are exigent. Both those tests have been met in this case.

The circumstances were exigent because the police faced the risk of the loss of evidence if they went to obtain a warrant. The police had to arrest the defendant in order to perform the breathalyzer test before the blood metabolized the alcohol. The risk of losing that evidence created the exigent circumstance. See Schmerber and Bentley.

The police had probable cause to believe that the defendant had committed the crime of operating a motor vehicle while under the influence of an intoxicant.

The test for probable cause was stated in Estrada, 63 Wis. 2d at 496:

> "Probable cause exists if the facts and circumstances known to the police officer warrant a prudent man in believing an offense has been committed. . . . Probable cause to arrest refers to that quantum of

> evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime."

(Citations and footnotes omitted.)

In the instant case, Officer Daley had received information from the witness, Randy Jablonic (13:27). Jablonic pointed out the car that the defendant had been driving and Daley checked the license and found that the car was registered to Welsh (13:28). Jablonic pointed out to Daley that the defendant had gone in the direction of the defendant's address (13:29). The defendant's home was one and one-half minutes away from where the defendant had left his auto (13:30). Jablonic told Daley that the defendant was obviously intoxicated and had been driving (13:30). Daley had previously visited the defendant's home to check out an alcohol-related disturbance (13:30-31).

The state submits that these facts show that Officer Daley had probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant. Therefore, both the probable cause and exigent circumstances tests were satisfied to justify the warrantless entry of the defendant's home to arrest him.

CONCLUSION

The state requests this court to reverse the decision of the court of appeals and to affirm the order of the circuit court.

Respectfully submitted,

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COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 26 1981

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

No. 80-1686

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD WELSH,

Defendant-Appellant.

NOTICE
This opinion is subject to further editing. If published the official version will appear in the bound volume of the Official Reports.

APPEAL from the order of the circuit court for Dane county: MARK A. FRANKEL, Judge. Vacated and remanded.

GARTZKE, P.J. Edward Welsh refused to take a breath test required by sec. 343.305(2), Stats., following a warrantless arrest in his home for violating sec. 346.63(1), Stats., operating a motor vehicle while under the influence of an intoxicant. A refusal hearing resulted in an order revoking his operating privilege from which defendant appeals. Prior to the refusal hearing, defendant challenged the validity of his arrest. At the close of the evidentiary hearing, the trial court determined that it was unnecessary to decide whether the police entered defendant's home with consent, because exigent circumstances justified the arrest. We disagree and remand for findings on the consent issue.

The facts prior to the officer's arrival at defendant's home are undisputed. A witness testified that he saw defendant's car operate erratically and leave the road about 8:30 p.m., April 24, 1978. The witness stopped and defendant asked him for a ride home. When the witness refused, defendant walked away and the witness stayed at the scene. Another person called the police. About five minutes later Officer Daley arrived. The witness told Daley what he had seen and that he thought defendant was possibly under the influence. Daley checked with the Motor Vehicle Department and learned that the car was registered to defendant. Daley and another officer arrived at defendant's home about 9:00 p.m. Daley testified he went to the house to arrest defendant and that he knew alcohol dissipates from the body with time.

Officer Daley testified that he and the other officer were admitted into the house, that defendant's wife advised Daley that defendant had stumbled into the house highly intoxicated and was upstairs in bed and that she told Daley she was concerned about the defendant's alcoholic problem and that "something has to be done." Daley entered the upstairs bedroom where he found and arrested defendant.

Defendant's wife testified that she was upstairs when

the police arrived and that she told the officers only that her husband was upstairs. She did not know what happened at the door when the police knocked but related the version given to her by her daughters. The daughters' story, as related by Mrs. Welsh without objection, is perhaps ambiguous. Officer Daley testified that defendant's daughter answered the door, opened it, said, "He is upstairs," pointed to the stairway, and allowed the officers to pass. Daley testified that Mrs. Welsh came out of the kitchen and gave her consent to the officers to go upstairs.

The trial court found that the officers arrived at defendant's home within ten minutes after he left the scene of the accident and that exigent circumstances existed for entering defendant's home without a warrant to arrest him. In the trial court's view, the exigency arose out of hot pursuit and the need to preserve evidence of intoxication which could be lost because alcohol is dissipated from the body with the passage of time.

In the absence of consent or exigent circumstances, entry into a home to make an arrest is unreasonable under the fourth amendment to the United States Constitution unless done pursuant to a warrant. Steagald v. United States, ___ U.S. ___ (decided April 21, 1981); Payton v. New

York, 445 U.S. 573, 583 (1980) ("Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" where no exigent circumstances).

What constitutes exigent circumstances or consent is a mixed question of fact and law. The factual basis for the court's finding of exigent circumstances is not substantially disputed. The conclusion that exigency existed is a question of law. We are not bound by the trial court's conclusion of law. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

Exigent circumstances may permit officers to make a valid warrantless arrest of a suspect in his home. In Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), an armed robbery suspect fled into a house. The Supreme Court held that exigent circumstances justified a warrantless police entry five minutes later "to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them." 387 U.S. at 298. In United States v. Santana, 427 U.S. 38 (1976), when police attempted to arrest a narcotics dealer in the doorway of her home, she retreated into the hallway and the officers pursued and arrested her. The Supreme Court held that the

fact that the pursuit ended almost as soon as it began did not render it less than a "hot pursuit," and the realistic expectation that any delay would result in the destruction of evidence justified the warrantless entry and arrest. 427 U.S. at 43.

The ultimate test is whether the entry and arrest were reasonable. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37.

The need to search defendant's home to preserve evidence was low compared to the interest invaded by the search. A violation of sec. 346.63(1), Stats., while serious, is a misdemeanor rather than a felony because it is not punishable by imprisonment in the Wisconsin state prison. Secs. 346.65(2) and (3) and 939.60, Stats. There is no evidence that injuries resulted from this single-car accident or that defendant was armed, violent or dangerous to himself or others after he left his car. Having arrived at his family home, whatever risk arose from his apparent intoxication was substantially reduced. There is no evidence that his wife or daughters needed help.

The privacy of the home is among our highest values. Invalidating a warrantless arrest after a warrantless entry, the Wisconsin Supreme Court emphasized that "one's home is entitled to special dignity and sanctity." Laasch v. State, 84 Wis.2d 587, 594, 267 N.W.2d 278, 282 (1978). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Payton, 445 U.S. at 589-90, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).

The prosecution relies on State v. Bentley, 92 Wis.2d 860, 286 N.W.2d 153 (Ct.App. 1979), which held that where there was probable cause to believe that a driver was guilty of the intoxicated use of a motor vehicle, the fact that blood rapidly metabolizes alcohol was an exigency which justified taking a blood sample from the driver without his consent. Bentley relied on Schmerber v. California, 384 U.S. 757 (1966). Schmerber held that if delay in obtaining a warrant threatens the destruction of evidence of a criminal offense because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, a warrant is unnecessary to take blood from the arrested person in a hospital. 384 U.S. at 770-71.

Bentley and Schmerber, supra, do not apply. The defendant in Bentley was charged with two counts of homicide and three counts of injury by intoxicated use of a motor vehicle, his home was not invaded without a warrant, and the exigency was sufficiently great in the view of the officers as to require forcibly taking a blood sample in a hospital. The defendant in Schmerber was involved in an accident in which he and a companion were injured and his home was not invaded. Welsh, on the other hand, was involved in a single-car accident with no apparent injuries, his home was invaded and the officers only requested that he submit to a blood alcohol content test.

We hold that the warrantless entry and arrest of defendant in his home was unreasonable and violates the fourth and fourteenth amendments to the United States Constitution, unless entry was gained by consent.

A warrantless entry of a home is valid if permission to search is obtained from a person who possesses common authority or other sufficient relationship to the premises or property. United States v. Matlock, 415 U.S. 164, 172 (1974). Because consent is an undecided issue, the trial court's findings are inadequate. We remand for a finding by the trial court

whether the officers entered the defendant's home with permission.[1]

By the Court.--Order revoking defendant's Wisconsin driver's license is vacated and the matter is remanded for further findings consistent with this opinion.

Inclusion in the official reports is not recommended.

---

[1] Appellant moved to strike as unsupported by the record a portion of the state's brief relating to the circumstances of the officers' entry. Because we have remanded for findings on the consent issue, it is premature for us to treat the issues raised by appellant's motion. The motion is denied for that reason.

September 16, 1981 – Introduced by Representative RUTKOWSKI; cosponsored by Senator ADELMAN, by request of Judicial Council. Referred to Committee on Judiciary.

AN ACT to amend 59.47 (7), 752.31 (2) (c) and (d) and 808.04 (2) (a); and to create 752.31 (2) (q) of the statutes, relating to proceedings before the court of appeals.

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the judicial council. For further information, see the state and local fiscal estimate which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 59.47 (7) of the statutes is amended to read:

59.47 (7) Upon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from his or her county to the court of appeals or supreme court. The district attorney of the county in which the case was filed shall represent the state in any appeal or other proceeding regarding that case which is heard decided by a single court of appeals judge, as specified in s. 752.31 (3).

NOTE: Subsection (7) is amended to clarify that the district attorney represents the state in appeals or other proceedings which are decided by a single court of appeals judge under s. 752.31. Subsection (7) is also amended to

clarify that under s. 752.31 a case is decided by a single court of appeals judge rather than heard. Some single-judge appeals or other proceedings are not heard, as oral argument may not take place in the case. The amendments to the statute are intended to harmonize the statute with the changes made to s. 752.31 by chapter 192, laws of 1979.

SECTION 2. 752.31 (2) (c) and (d) of the statutes are amended to read:

752.31 (2) (c) Cases involving violations of traffic regulations, as defined in s. 345.20 (1) (a), and cases under s. 343.305.

(d) Cases under ch~ chs. 51 and 55.

SECTION 3. 752.31 (2) (g) of the statutes is created to read:

752.31 (2) (g) Cases involving civil forfeitures.

NOTE: Subsection (2) is amended to provide that cases under ch. 55, like cases under ch. 51, are decided as specified in sub. (3) and to clarify that cases under s. 343.305 are also decided as specified in sub. (3). Cases under ch. 55 and forfeitures are to be decided in the same manner as the other types of cases specified in sub. (2).

SECTION 4. 808.04 (2) (a) of the statutes is amended to read:

808.04 (2) (a) Subsection (1) does not apply to an appeal for which a specific time period for initiating an appeal is expressly provided by law. Appeals for which special time periods are provided include: s. 9.10 (4) (a) (recall), 30.30 (3) (c) (harbor improvements), 32.05 (13) (condemnation), 32.06 (13) (condemnation), 48.911 (adoption proceedings), 62.075 (4) (detachment of farm lands), 66.014 (7) (b) (municipal incorporation), 66.021 (10) (b) (annexation), 66.05 (8) (c) (razing buildings), 66.435 (4) (b) (urban renewal), 87.16 (flood control projects), 88.09 (2) (drainage of lands), 102.25 (1) (worker's compensation), 111.07 (7) (employment relations commission), 117.03 (5) (school district reorganization), 128.15 (1) (objections to creditors' claims), 128.20 (2) (settlement of receiver's or assignee's accounts), 182.60 (10) (b) (special economic improvement districts), 186.29 (5)

(revaluation of credit union shares), 215.32 (12) (revaluation of savings and loan accounts), 227.21 (review of administrative agency decisions), 227.26 (enforcement of laws attacked in federal court), 779.29 (log liens), 786.03 (conveyance: specific performance), 808.07 ~~(6)~~ (7) (eviction actions), 879.27 (3) (probate court), 879.31 (extension of probate court appeals) and 974.02 (criminal, juvenile, civil commitment and protective placement cases).

NOTE: Subsection (2) (a) is amended to correct the erroneous reference to s. 808.07 (6) for eviction actions. Eviction actions are governed by s. 808.07 (7).

(End)

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS, DISTRICT IV, THAT VACATED AND REMANDED THE ORDER OF THE CIRCUIT COURT FOR DANE COUNTY THE HONORABLE MARK A. FRANKEL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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III.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION
OF THE COURT OF APPEALS, DISTRICT IV,
THAT VACATED AND REMANDED THE ORDER
OF THE CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE MARK A. FRANKEL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES

1. Should an appeal from an order under s. 343.305, Stats., to suspend a defendant's operating privileges for failure to submit to a breathalyzer test be decided by a panel of three court of appeals' judges or one court of appeals' judge?

This appeal was decided by one court of appeals' judge.

2. Did the police have probable cause to arrest the defendant for the commission of a crime?

This issue was not decided by the court of appeals' judge.

3. Did the facts present exigent circumstances so that the warrantless arrest of the defendant in his home for operating a motor vehicle while under the influence of intoxicants was valid under the fourth amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution?

Trial court answered: yes.

Court of appeals answered: no, because the case did not present exigent circumstances.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant does not believe that the oral argument would be helpful because the issue of lack of probable cause is so obvious that the other issues, although of great interest, are nonetheless moot. The defendant believes, however, that the publication is warranted in order to provide a statement on correct application of fourth amendment law to operating a motor vehicle while intoxicated.

STATEMENT OF THE CASE

The defendant-appellant agrees with the statement of the plaintiff-respondent-petitioner.

FACTUAL STATEMENT

The defendant-appellant has no additional facts to present on this review.

ARGUMENT

I. THE ISSUE OF WHETHER OR NOT THE APPEAL SHOULD HAVE BEEN HEARD BY A PANEL OF THREE JUDGES IN THE COURT OF APPEALS DOES NOT MEET THE CRITERIA ESTABLISHED BY THE COURT IN GRANTING A REVIEW TO PETITION TO APPEAL.

The supreme court in its Per Curiam Opinion set forth the following criteria in determining whether or not to grant a petition to appeal, to wit:

> "A) A real and significant question of federal or state constitutional law is presented.
>
> "B) The petition demonstrates a need for this court to consider establishing, implementing or changing a policy within this court's authority.
>
> "C) A decision by this court will help develop, clarify or harmonize the law and
>
> > 1) The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> >
> > 2) The question presented is a novel one, the resolution of which will have state-wide impact; or
> >
> > 3) The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by this court.
>
> "D) The Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court or this court or other Court of Appeals' decisions.
>
> "E) The Court of Appeals' decision is in accord with opinions of this court or the Court of Appeals but due to the passage of time or changing circumstances, such opinions are ripe for re-examination."

November 15, 1978, 85 Wis. 2d XII, 268 N.W. 2d XXVIII. This issue raised by the state does not fall into any of the above criteria.

As argued by the state, s. 752.31, Stats., provides, in part:

> "(1) Except as otherwise provided in this section, the court of appeals shall sit in panels of three judges to dispose of cases on their merits.
>
> "(2) Appeals to or other proceedings in the court of appeals in the following types of cases shall be decided as specified in sub. (3):

* * *

(b) Municipal ordinance violation cases.

(c) Cases involving violations of traffic regulations, as defined in s. 345.20 (1) (a).

* * *

(f) Misdemeanors."

Section 343.305(7), Stats., (1975) provides for the testing of one's blood, breath or urine for the purpose of determining intoxication as it relates to operating a motor vehicle in violation of a municipal ordinance, traffic regulation or a misdemeanor, such as the traffic crime of operating a motor vehicle while intoxicated after a prior conviction of the same offense.

Section 346.65(2), Stats., provides as follows:

"Any person violating s. 346.63 (1) may be required to forfeit not more than $200.00 for the first offense and, upon the 2nd or subsequent conviction within 5 years, shall be imprisoned not less than 5 days nor more than one year and in addition may be fined not more than $500.00."

A first violation of s. 346.63, Stats., which prohibits operation of a motor vehicle while under the influence, is not a criminal act. State v. Albright, (App. 1980), 298 N.W. 2d 196, 98 Wis. 2d 663. Because of the penalty provision, however, a second violation of s. 346.63, Stats., is a criminal act.

Section 939.12, Stats., (1975) defines "crime" as:

"A crime is conduct which is prohibited by state law and and punishable by fine or imprisonment or both. Conduct punishable by a forfeiture is not a crime."

Section 939.60, Stats., (1975) provides as follows:

"A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

It is clear, therefore, from the foregoing it was the legislative intent to provide the state with the mechanism of gathering evidence to prove a violation involving operating a motor vehicle in municipal ordinances, traffic regulations and traffic crimes classified as misdemeanors. It was also the intent of the legislature in reorganizing the court system to provide a swift appellate procedure for the disposition of these relatively minor cases by splitting up the cases to be heard by one judge instead of three judges. The state has not demonstrated any profound need to override the obvious intent of this innovative legislative action.

II. AT THE TIME OF THE WARRANTLESS ARREST OF THE DEFENDANT IN HIS HOME, THE POLICE DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT HAD COMMITTED A CRIME.

The defendant-appellant concurs with the petitioner's argument on Pages 24 and 25 of its brief that in Wisconsin law enforcement officers may arrest a suspect on the basis of probable cause that the suspect has committed a felony or misdemeanor. The defendant-appellant also concurs with the following argument on Page 15 of the petitioner's brief:

> "The basic rule in regard to arrest in a suspect's home is that, in the absence of an arrest warrant and in the absence of consent to enter, the police need probable cause to believe the suspect committed the crime and exigent circumstances in order to make a constitutionally valid arrest. Payton v. New York, 445 U.S. 573 (1980), and Laasch v. State, 84 Wis. 2d 587, 591-93, 267 N.W. 2d 278, 281-82 (1978)."

Section 346.63, Stats., provides, in part, as follows:

"(1) It is unlawful for any of the following to drive or operate a motor vehicle:

(a) A person who is under the influence of an intoxicant or controlled substance;"

As previously argued, the first offense of s. 346.63, Stats., is not a criminal act. State v. Albright, (App. 1980), 298 N.W. 2d 196, 98 Wis. 2d 663. It is only when an operator subsequently violates the statute that he becomes a criminal offender.

Therefore, upon the foregoing authority, before the officers could have constitutionally invaded the home of the defendant-appellant they must have had probable cause to believe that the defendant-appellant had been previously convicted of operating a motor vehicle while intoxicated. The record is clear that this essential fact was not known to the arresting officers prior to the warrantless arrest.

Both at the time of trial and during the appeal, the state argued that as long as the officers merely had a reasonable belief that the defendant had operated a motor vehicle in violation of s. 346.63 (1) was sufficient probable cause to believe that a crime was committed thereby justifying a warrantless arrest. (Def.-App. App. 101-103).

It is evident from the record that the police had no idea that the defendant had ever been charged much less convicted of a prior violation of operating a motor vehicle while intoxicated. At best, as admitted in the state's brief, all the officers knew was that the defendant had apparently violated s. 346.63, Stats., which, if it were his first offense, would only subject him to a non-criminal penalty of a forfeiture.

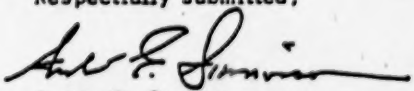
III. THE OPINION OF THE APPELLATE COURT DATED AND RELEASED MAY 26, 1981, IS CORRECT AND FOUNDED UPON GOOD LAW.

The defendant believes that the decision of the appellate court was correct and founded upon good, sensible law. Accordingly, the defendant refers to said decision in support of this argument.

CONCLUSION

Since the record conclusively shows that the arresting officers did not have probable cause to believe a crime had been committed prior to invading the defendant's home and perfecting a warrantless arrest, this case must be remanded to the trial court for purposes of dismissal.

Respectfully submitted,



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A. ARREST BASED ON PROBABLE CAUSE

Wisconsin Statute Section 968.07(1)(d) authorizes police officers to make arrests without arrest warrants. It provides that a law enforcement officer may arrest a person when there are reasonable grounds to believe that person is committing or has committed a crime. In the present case, the defendant was arrested by Officer Daley and charged with violating Section 346.63(1) of the Wisconsin Statutes, Operating a Motor Vehicle While Under the Influence of An Intoxicant or Controlled Substance. There are two elements to that crime.

1) The defendant must have been operating a motor vehicle on a highway in the State of Wisconsin; and

2) The defendant while operating his vehicle must have been under the influence of an intoxicant or controlled substance.

Therefore, the question before the trial court in the present case was whether or not Officer Daley had probable cause to believe that the defendant had violated Section 346.63(1) when he was arrested. The trial court held that he did. Respondent agrees. Probable cause was defined in Kluck v. State, 37 Wis. 2d 378, 155 N.W. 2d 26 (1977):

> "Probable cause exists if the facts and circumstances known to the police officer warrant a prudent man in believing that an offense has been committed. It refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime."

In State v. Paszek, 50 Wis. 2d 619, 624-625, 184 N.W. 2d 836 (1971) the Court defined probable cause for an arrest as being:

"probable cause to arrest refers to that quantum of evidence which would lead a police officer to believe that the defendant probably committed a crime. Henry v. U.S, (1959), 361 U.S. 98. It is not necessary that the evidence giving use to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, Browne v. State, supra, and it is well established that the belief may be predicated in part upon hearsay information. Draper v. U.S,, 358 U.S. 307 (1959). The quantum of evidence which constitutes probable cause to arrest must be measured by the facts of a particular case. Wong Sun v. U.S, (1963) 371 U.S. 471." (emphasis added)

The Respondent believes that the facts and information that Officer Daley possessed at the time he arrested the defendant were sufficient enough to warrant a prudent man in believing the defendant had probably been operating his automobile in violation of Section 346.63(1). Shortly before arresting defendant, Randy Jablonic gave Officer Daley the following information:

1) Defendant was operating his motor vehicle on a highway in the State of Wisconsin;

2) Defendant was operating his motor vehicle in a very erratic manner, and nearly caused a serious traffic accident;

3) Defendant left his motor vehicle in the cemetery;

4) Defendant staggered when he walked and was very unsteady;

5) Defendant's speech was very slurred;

6) Defendant had just left the area, heading in the direction of Tree Lane;

7) Defendant's physical description; and

8) His belief that defendant was possibly under the influence of an intoxicant or controlled substance.

There can be no question that Jablonic's information, if reliable, meets the probable cause standard set in Paszek, supra. The trial court viewed Jablonic's hearsay information as being credible, as the Court concluded that Jablonic was a citizen informant. In Paszek, information given to the police by a citizen informant, which demonstrated that the informant was in a position to see what he claims he saw, was enough to establish its reliability.

STATE OF WISCONSIN

IN SUPREME COURT

No. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION
OF THE COURT OF APPEALS, DISTRICT IV,
THAT VACATED AND REMANDED THE ORDER
OF THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE MARK A. FRANKEL, PRESIDING

REPLY BRIEF OF PETITIONER

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1/7/81

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STATE OF WISCONSIN

IN SUPREME COURT

No. 80-1686

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v.

EDWARD WELSH,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS, DISTRICT IV, THAT VACATED AND REMANDED THE ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE MARK A. FRANKEL, PRESIDING

REPLY BRIEF OF PETITIONER

INTRODUCTION

In the reply brief the state will address the defendant's argument that the arresting officers lacked probable cause on the ground that there is no evidence in the record showing that at the time the arrest was made the officers knew that the defendant had been previously convicted of drunken driving. As to all other issues the state relies on its original brief and appendix.

I. THE DEFENDANT HAS WAIVED HIS RIGHT TO HAVE THIS COURT CONSIDER HIS CONTENTION THAT THE POLICE LACKED PROBABLE CAUSE TO ARREST IF THEY WERE NOT AWARE OF A PREVIOUS CONVICTION OF THE DEFENDANT FOR VIOLATION OF SEC. 346.63(1), STATS.

In his responding brief in this court, the defendant has argued that the police entry into his home to arrest him was unlawful because at the time of the entry the police did not have probable cause to arrest him. The defendant contends the police lacked probable cause because the record does not show that at the time of the entry the police were aware that the defendant had been previously convicted for violating sec. 346.63, Stats. (See page 6 of defendant-appellant's brief.)

Pursuant to sec. 346.65(2), Stats. (1975), a violation of sec. 346.63(1), Stats., is not a misdemeanor unless the defendant was convicted of such a violation within the previous five years.

This is the first time the defendant has raised this issue. The defendant did not challenge probable cause on this ground in either the trial court or the court of appeals.

At the hearing on July 14, 1980, where the court considered the validity of the arrest, the issue was whether the police could justify the entry into the house on the basis of consent, hot pursuit or exigent circumstances (14:5-13, 24-35). The defendant did not

challenge the trial court's finding that the police had probable cause to make the arrest (14:35). At no time during the hearing did the defendant argue that, in order to have probable cause to make the arrest, the police had to know that the defendant had been previously convicted of drunken driving. At one point during the hearing the defendant's attorney agreed with the trial court that the question was whether there was hot pursuit, exigent circumstances and consent in order to justify the warrantless arrest in the home (14:11).

Also, in his original brief and his reply brief in the court of appeals, the defendant did not challenge the trial court's finding of probable cause. In his original brief in the court of appeals the issue argued by the defendant was whether the police could justify the warrantless entry into the home on the basis of hot pursuit or exigent circumstances (see pages 6-8 of the defendant's original brief in the court of appeals). At pages 7 and 8 of his original brief in the court of appeals the defendant concluded that in the absence of exigent circumstances and hot pursuit his arrest was unlawful and the trial court did not have personal jurisdiction over him.

At page 2 of his reply brief in the court of appeals the defendant stated: "The only dispositive issue here is whether exigent circumstances justified the warrantless arrest of appellant by the police inside the privacy of his home." The defendant added that, if such

circumstances did not exist, his arrest was unlawful and the trial court did not have jurisdiction to hold a reasonableness hearing. Also at page 2 of his reply brief the defendant admitted that the police had probable cause to investigate whether he had been operating a motor vehicle while intoxicated; and the defendant argued that he was entitled to relief because there were no exigent circumstances to justify the warrantless entry into his home.

Because the defendant did not raise the probable cause issue in the trial court or in the court of appeals, he has waived it and the issue may not be raised as of right for the first time in the supreme court. See State v. Brown, 96 Wis. 2d 258, 263, 291 N.W.2d 538 (1980), and Lampkins v. State, 51 Wis. 2d 564, 570-71, 187 N.W.2d 164 (1971). Also see Neely v. State, 97 Wis. 2d 38, 55, 292 N.W.2d 859 (1980), where the defendant was deemed to have waived an issue by his failure to raise it in the trial court or the court of appeals.

The defendant has raised the issue of probable cause in his challenge to the lawfulness of the arrest. The questions of the lawfulness of the arrest and probable cause to support the arrest go to the court's personal jurisdiction over the defendant. See Walberg v. State, 73 Wis. 2d 448, 457-58, 243 N.W.2d 190 (1976), and Lampkins, 51 Wis. 2d at 570. The issues of probable cause and lawfulness of the arrest are waived if not timely raised.

Walberg, 73 Wis. 2d at 458-60; and Lampkins, 51 Wis. 2d at 570-71. Therefore, because he failed to previously challenge the probable cause to support the arrest on the ground that the police were not aware of a previous drunken driving conviction, the defendant has waived that issue and is not entitled to have it reviewed as a matter of right in this court. Because the defendant has raised this issue for the first time in the supreme court after failing to raise it in the trial court and the court of appeals, this court should refuse to consider the merits of the claim. However, if the court does consider the merits, the state believes that the arresting officers had probable cause to make the arrest at the time they entered the defendant's home.

II. WHEN THEY ENTERED THE DEFENDANT'S HOME THE ARRESTING OFFICERS POSSESSED PROBABLE CAUSE TO ARREST THE DEFENDANT FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT.

Even if the arresting officers, at the time they entered the defendant's home, were not aware of a previous drunken driving conviction for the defendant, the officers possessed probable cause to arrest the defendant for operating a motor vehicle while under the influence of an intoxicant in violation of sec. 346.63(1)(a), Stats. (1975).

The police possess probable cause to make an arrest when they have enough information to lead a

reasonable officer to believe that guilt is more than a possibility." See State v. Cheers, 102 Wis. 2d 367, 386, 306 N.W.2d 676 (1981), quoting from State v. Paszek, 50 Wis. 2d 619, 624-25, 184 N.W.2d 836 (1971). In another portion of the quote from Paszek, this court said in Cheers that probable cause exists where the information within the officer's knowledge is sufficient to warrant a man of reasonable caution to believe that an offense has been committed. Cheers, 102 Wis. 2d at 387.

In this case, the police had probable cause to believe that the defendant had committed the offense of operating a motor vehicle while under the influence of an intoxicant in violation of sec. 346.63(1)(a), Stats. (1975). In order to convict the defendant for violating sec. 346.63(1), Stats., two elements must be proven: "(1) that the defendant was driving or operating a motor vehicle; and (2) that the defendant was under the influence of an intoxicant at the time that he was driving or operating the motor vehicle." State v. Burkman, 96 Wis. 2d 630, 644, 292 N.W.2d 641 (1980). Those elements are the same whether the defendant is charged civilly or with a misdemeanor. See secs. 346.63(1)(a) and 346.65(2), Stats. (1975).

As discussed at pages 30 and 31 of the state's brief-in-chief in this court, the police possessed sufficient information to show probable cause as to both elements of the charge. They had been informed that the

defendant was operating a vehicle and they had also been informed that the defendant was under the influence of an intoxicant. Therefore, the police possessed probable cause to believe that the defendant had committed an offense by violating sec. 346.63(1), Stats. (1975).

Whether the defendant was guilty of violating a traffic regulation or committing a misdemeanor, the police had the authority to arrest him without a warrant as long as they had reasonable grounds to believe that he had violated the law. Section 968.07(1)(d), Stats., authorizes the police to make a warrantless arrest for a misdemeanor or a felony as long as the officer possesses reasonable grounds to believe that the person committed a crime. Section 345.22, Stats., authorizes a traffic officer to arrest a person without a warrant for violation of a traffic regulation if the officer has reasonable grounds to believe that the person has violated a traffic regulation. A traffic regulation is a provision in chs. 341 to 349 for which the penalty for a violation is a forfeiture. See sec. 345.20(1)(a), Stats. Section 346.63(1), Stats. (1975), is considered a traffic regulation for the first conviction because the penalty is a forfeiture. See sec. 346.65(2), Stats. (1975).

Thus, the police had the authority to make a warrantless arrest of the defendant as long as they possessed probable cause to believe that he had committed a crime or violated a traffic regulation. In other words,

the police had the authority to make a warrantless arrest on the basis of probable cause whether the proposed charge was a crime or violation of a traffic regulation. In either case, the police possessed probable cause on each element of the charge; and therefore the police possessed probable cause to make the arrest. Because the police possessed probable cause to make the arrest, and because the police had the authority to make the arrest, and because exigent circumstances existed, the police were authorized to enter the defendant's home without a warrant to make the arrest. Therefore, whether at the time they entered the home the police were aware of a prior drunken driving conviction for the defendant is irrelevant to the question of whether the police possessed probable cause to make an arrest, since, even without the knowledge of a prior conviction, the police possessed sufficient information concerning the two elements of the charge in order to satisfy probable cause requirements.

CONCLUSION

For the reasons stated in this reply brief and for the reasons stated in its brief-in-chief, the state requests this court to reverse the decision of the court of appeals and to affirm the order of the circuit court.

Respectfully submitted,

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STATE OF WISCONSIN

IN COURT OF APPEALS

APPELLATE DISTRICT NO. IV

CASE NO. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

EDWARD WELSH,

Defendant-Appellant.

Appeal from an Order entered July 14, 1980, by the Honorable Mark A. Frankel, Judge, Dane County Circuit Court, Branch 12.

APPELLANT'S BRIEF AND APPENDIX

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Appeal from an Order entered July 14, 1980, by the Honorable Mark A. Frankel, Judge, Dane County Circuit Court, Branch 12.

APPELLANT'S BRIEF

ISSUE FOR REVIEW

Did the Trial Court have jurisdiction to hold a reasonableness hearing on the defendant's refusal to take a breathalyzer test where defendant was arrested without a warrant inside his home?

The Trial Court Answered: Yes.

ORAL ARGUMENT

The Appellant takes the position that oral argument would be an unnecessary burden on the time and resources of the Appellate Court.

PUBLICATION OF OPINION

The Appellant takes the position that the opinion should be published because this issue has not been previously decided by an Appellate Court and is of great importance to every Wisconsin citizen.

STATEMENT OF THE CASE

This is an action to suspend the operator's license of the defendant for 60 days pursuant to s. 343.305(7)(b), Stats. (1975). The defendant was arrested and criminally charged with operating a motor vehcile while intoxicated contrary to s. 343.63(1)(a), Stats. (1975), on April 24, 1978. He refused to submit to a breathalyzer test. This action commenced when the defendant was served with notice of intent to suspend operating privileges on April 27, 1978, for said refusal.

The defendant made his initial appearance by special appearance. He stood moot, whereupon, the Court entered a plea of not guilty. He then made a timely request for a hearing to determine the reasonableness of his refusal.

Prior to the reasonableness hearing, an evidentiary hearing was held on the defendant's motion attacking the Court's jurisdiction on July 14, 1980. Two issues were raised: (1) whether the police had probable cause to arrest the defendant and (2) the validity of the arrest. The

Court held the warrantless arrest valid on the grounds of "hot pursuit" and exigent circumstances. The Court also found that consent to the entry of defendant's home was not at issue. (R. 14-34-35, A.Ap.p. 115-116).

On September 5, 1980, a hearing was held to determine the reasonableness of the defendant's refusal. The primary issue raised was whether the defendant was under a valid arrest at the time he was requested to submit to a breathalyzer test pursuant to s. 343.305(2)(b)(1) and s. 343.305(7)(c), Stats. (1975). The Court ruled that it was bound by its prior holding as to the validity of the arrest, thus, finding the defendant's refusal unreasonable. (R. 10-39, A.Ap.p. 103-104). The Court then ordered the suspension of the defendant's operators license for 60 days. (R. 9-2, A.Ap.p. 101).

The defendant served his Notice of Appeal on September 15, 1980, and filed it on September 16, 1980.

FACTUAL STATEMENT

On or about April 24, 1978, at 8:30 p.m. the defendant was driving home on Mineral Point Road in the City of Madison, Dane County, Wisconsin. (R. 13-16, A.Ap.p. 109-110). It was raining and visibility was poor. The defendant strayed across the center line of the highway, and in order to avoid a head-on collision with an oncoming vehicle, he took evasive ation by swerving left off the highway and onto an open field. Since his vehicle was stuck in the mud, the defendant requested a ride

from Randy Jablonic who was parked on the side of the road after observing the incident. (R. 13-8 to 13-14, A.Ap.p. 104-109). When Jablonic refused, the defendant walked to his nearby residence at 7158 Tree Lane and went to bed before 9:00 p.m. (R. 10-18, A.Ap.p. 102-103).

At 8:49 p.m. the dispatcher for the Madison Police Department received a call reporting the incident. The police arrived at the scene a few minutes later, ran an identification check on the vehicle and took a statement from Jablonic. (R. 13-40 to 13-42, A.Ap.p. 112-115). Jablonic testified that he told the police he believed something was wrong with the defendant. He stated that he thought the defendant was either very sick or drunk, (R. 13-14, A.Ap.p. 109), but that he did not have the opportunity to smell intoxicants on the defendant's breath. (R.13-11, A.Ap.p. 106).

After this initial investigation, the police proceeded to the defendant's home. Police Officer Richard Daley testified that he arrived there eleven minutes after he received the call. (R. 10-13, A.Ap.p. 101-102). The defendant's wife, however, testified that the police arrived 30 to 45 minutes after her husband had come home. (R. 10-34, A.Ap.p. 103).

It is an undisputed fact that the police entered the defendant's home without consent and without a warrant. Police Office Daley testified that they proceeded to the bedroom where defendant was sleeping, entered the room and subsequently detected the odor of intoxicants. They ordered the defendant to get dressed, placed him under arrest and

issued him a citation. (R. 13-37-38, A.Ap.p. 110 - 112). The defendant was subsequently taken downtown to the Madison Police Department and offered a breathalyzer test which he refused. (R. 10-8, A.Ap.p. 101). This action was commenced September 15, 1980.

ARGUMENT

The Warrantless Arrest of the Defendant Inside his Home was Unconstitutional and Unlawful, Therefore, the Court did not Have Jurisdiction to Conduct a Hearing on the Reasonableness of Defendant's Refusal to Submit to a Breathalyzer Test.

The warrantless and unconsented entry by the police into the defendant's home to effect his arrest is prohibited by the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. This fundamental right to privacy is excepted by only a few judicially determined circumstances. "Absent exigent circumstances, the entry of one's dwelling without consent to effect a warrantless felony arrest on probable cause, is unlawful." Lasch v. State, 84 Wis. 2d 587, 596, 267 N.W. 2d 278 (1977).

In the present case, the entry of the defendant's dwelling without consent was to effect a warrantless arrest in a civil-type of special proceeding. It is highly doubtful whether the seriousness of this offense under any circumstance could justify such an intrusion into one's home by the State; especially where the police went to the defendant's home initially to only investigate the possibility of such an offense. The defendant's warrantless arrest in the privacy of his bedroom at home where

he had been sleeping is "police conduct that shocks the conscience." Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 209, 96 L. Ed. 183 (1952).

The test as to the reasonableness of a police invasion of privacy to investigate suspicious circumstances or conduct is whether the interests of the State outweigh the nature of the intrusion on the privacy of the individual. Although the police have the right to engage in legitimate and restrained investigative conduct based on ample factual justification, such justification falls short of that required to support an arrest. Bies v. State, 76 Wis. 2d 457, 465, 251 N.W. 2d 461 (1976); Terry v. Ohio, 392 U.S.1, 15, 81S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The police in this case only had probable cause to investigate the possibility that the defendant was driving while intoxicated. The witness Jablonic never had an opportunity to smell intoxicants on the defendant's breath. He even suggested that the defendant may have been sick. Yet, based upon this evidence, the Trial Court held that the police had probable cause to arrest the defendant in his home without a warrant on grounds of "hot pursuit" and exigent circumstances. R. 14-35, A.Ap.p. 115 - 116).

The Court's finding of "hot pursuit", however, is not supported by the facts. The police pursued the defendant merely on the subjective observations of Jablonic, not after observing the defendant commit the

offense and then fleeing to the safety of his home. The police never had the necessary eye contact of physically observing the defendant committing the offense to justify their warrantless arrest of him inside his home on grounds of "hot pursuit." Carson v. Pape, 15 Wis. 2d 300, 302, 308, 112 N.W. 2d 693 (1961). (R. 13-42, A.Ap.p. 114-115).

The Court's finding of exigent circumstances is also unsupported by the facts. Such circumstances exist when swift action is required to prevent imminent danger to life or property, or to prevent the escape of a suspect or the destruction of evidence. Laasch v. State, supra, 84 Wis. 2d at 592. In this instance, the defendant was not going to escape or present any imminent danger to life or property since he was at home and in bed asleep.

The Court predicted its exigent circumstance finding primarily on destruction of evidence grounds. (R. 14-35, A.Ap.p. 115-116). Apparently the Trial Court relied on State v. Bentley, 92 Wis. 2d 860, 864, 286 N.W. 2d 153 (1973) which held that "blood rapidly metabolizes alcohol after a person ceases drinking; thus creating an exigent situation."

In Bentley, the Court concluded that the police had probable cause to arrest the defendant since they detected the odor of alcohol on his breath, and he was responsible for an accident which killed two people and seriously injured three others. Based on such probable cause and the exigency of blood rapidly metabolizing alcohol, the Court held that the police did not need a warrant to request the defendant to submit

to a blood test.

The exigent circumstances of Bentley are not present in this case because the police did not discover any evidence of alcohol on the defendant's breath until after they were unlawfully in his home. The police in Bentley had some knowledge of such evidence before they had any need to act quickly to preserve it. The police here did not have this knowledge before they entered the defendant's home. Arguably, if the police had not detected the odor of alcohol on the defendant's breath while unlawfully in his home, they would not have charged him with operating a motor vehicle while intoxicated. Under these circumstances, the State's interest in this incident hardly outweighs such an intrusion upon the privacy of the defendant. Bies v. State, supra, 76 Wis. 2d at 467.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibits such an intrusion upon the privacy of the defendant. Without a warrant and without consent, the police were prohibited from proceeding through the door of the defendant's home and up to his bedroom to continue their investigation. The unlawful entry, therefore, destroys the validity of the subsequent arrest which obviates any exigent circumstance that may have justified such a warrantless in-house arrest. Absent exigent circumstances, the unlawful arrest of the defendant precluded the Trial Court from personal jurisdiction over him.

Without personal jurisdiction, the Trial Court could not suspend the operator's license of the defendant on the basis of a hearing held to determine the reasonableness of his refusal to submit to a breathalyzer test. "Revocation cannot occur without a hearing, a hearing cannot occur without a citation and a citation cannot occur without an arrest." That arrest must be lawful. 67 Op. Att'y. Gen. 314 (1978). The Trial Court, therefore, did not have jurisdiction over the defendant to conduct a reasonableness hearing or suspend his license for 60 days.

CONCLUSION

The order suspending the operator's license of the Appellant for 60 days should be reversed and his operating privileges reinstated.

Respectfully Submitted,

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APPELLANT'S APPENDIX

9-2 DOCKET ENTRY DATED SEPTEMBER 5, 1980

(Formal Parts Omitted)

Court finds refusal to be unreasonable. Wisconsin Drivers License suspended for 60 days. Court ordered a stay of 14 days in which to file Notice of Appeal.

10-8 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

DIRECT EXAMINATION BY ATTORNEY STEWART

A. And then the question was put, "Will you submit to a chemical test of your breath?".

Q. And did Mr. Welsh answer that question for you?

A. Yes.

Q. What did he say?

A. No.

10-13 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

CROSS EXAMINATION BY ATTORNEY SIMONSON

A. I would have to refresh my recollection from the court--I know it was approximately eleven minutes.

Q. All right. The eleven-minute span we're talking about, that's from the time you arrived at the scene and talked to a witness and then proceeded down to

my client's residence?

A. No.

Q. The eleven-minute span was between the time of the incident and your arrival at his house?

A. Yes.

10-18 PARTIAL TESTIMONY OF EDWARD WELSH:

DIRECT EXAMINATION BY ATTORNEY SIMONSON

Q. And, tell us what you did when you came home.

A. Came home, came in, went to the hallway, hung up my coat, went upstairs and met my wife. She was upstairs and I went up and took my clothes off and put them in the bathroom and got into bed. I had a pint of Canadian Club in there and I took a couple of good drinks of it and got into bed and started to go to sleep. It was cold out.

Q. But you were out that evening?

A. Right.

Q. Did you, in fact, sleep or doze?

A. I started to, yes.

Q. Then what happened?

A. I was woke up by three officers standing in my bedroom, in the doorway of the bedroom, you know.

Q. Did you have any clothes on?

A. No, I was under the blankets.

10-34 PARTIAL TESTIMONY OF PATRICIA WELSH:

DIRECT EXAMINATION BY ATTORNEY SIMONSON

Q. Do you remember when Mr. Welsh arrived home?

A. Not the exact time.

Q. But you remember when he came home?

A. Yes.

Q. You also recall that sometime thereafter the police officers arrived?

A. Yes.

Q. All right. And do you recall how long a period of time elapsed between the time your husband came home and the officers arrived?

A. Half-hour to forty-five minutes.

Q. And the last time you testified--I forgot what you said, but you said either ten minutes, a few minutes, or forty-five minutes, something like that?

A. I think I said a half-hour or forty-five minutes

10-39 PARTIAL TRANSCRIPT OF THE COURT'S FINDING BY JUDGE FRANKEL

THE COURT: I think if I were incorrect in my

view of the law I would concede, in all likelihood, Mr. Simonson's point that the officers may not gather evidence or they may not pursue action against the defendant if it was a direct consequence of an unlawful arrest, but, as I indicated earlier, the Court is bound by its earlier ruling that that was a valid arrest. And, I think Mr. Simonson certainly will have the right to challenge that on appeal if he appeals this matter, as well as the previous ruling should there be a conviction on the underlying charge.

13-8 PARTIAL TESTIMONY OF RANDY JABLONIC:

DIRECT EXAMINATION BY ATTORNEY STEWART

A. Well, I had just driven under the West Beltline and a car had pulled out in front of me. I don't recall if it had come over the ramp or one of the first streets. It was raining and wet. Visibility was bad, and I first took the assumption that I was following a very elderly person that was driving extremely cautiously, very, very slow, and then a little faster. As it proceeded east then it began--the car began to go from

13-9 one side of the road to the other. And I began to be

very much aware that the person, obviously, did not have good control of the vehicle that they were driving. And as we approached the boulevard section near the West Towne area where the road divided, the car was headed right directly at the median where there is a sign or arrow posted that you should stay to the right. And I thought that the car--it wasn't travelling at an excessive rate of speed. But it was weaving back and forth. And it appeared to me they were going to take the signpost right off. I don't recall that they did. But they did then veer to the left lane and go down the left lane quite suddenly. There is another car coming from the east, going west, and I thought there might be a head-on collision. And then at the last moment the car that I had been following veered left and drove right into that cemetary or open field there and proceeded to stall out there or get stuck because it was wet.

Q. Did you stop your vehicle?

A. You know, there wasn't anything--I stayed a great distance behind--not a great distance, but a safe distance behind, because I didn't want to be involved.

I realize this driver was very erratic. And as soon as he had driven off into the field I thought the person

13-10 was either sick or very much something wrong. So, I drove to the next intersection, which was just a few hundred feet. I made a U-turn there and pulled up behind because I didn't want that car to come back out on the road. Because I realize they would probably kill somebody. And I immediately stopped the lady or the person who had been forced to stop by this car, and asked them to go call the police--to get some help so that we could prevent this person from getting back out on the road.

13-11 Q. And did you--did this person get close enough to you that you could observe his breath?

A. No. They remained outside the vehicle. I did roll down the window. I conversed with the person. But there was no opportunity to smell the breath.

Q. What about his speech? Was anything unusual about his speech pattern?

A. Well, the person--he stood there quite some time--what seemed like a long time for a person that had approached the vehicle, and then asked if I would

give him a ride home. And that was a very--appeared to be a very controlled conversation--"wouldn't you please give me a ride home"--or something of that nature. And then I said no, that we better wait to get some help to get the car out. And then the person broke into a very slurred conversation--"you wouldn't get your cops"--or something--it was a very insecure and not very controlled conversation. I was very--they were very much concerned that I would call the cops, and they were accusing that I was going to call the cops. I said, "Well, I have sent the lady to get help." I didn't want the person to leave. And I thought it was important that we keep him there by the vehicle.

Q. What did that person do after you informed him that the police were--

A. Well, for a moment he left, and then came back and asked again if I wouldn't please give him a ride home. And I said, "No," that I wouldn't and then he left. And I watched for a while. He was going back--going north on that road. And then I thought that they swerved to the east, but, you know, it was

dark and raining, and I was more interested in waiting for an officer to arrive. And I, at the same time, wanted to keep an eye on the car.

Q. Would you recognize that individual if you see him again?

13-13 A. I would say it is the gentleman sitting over here with the orange shirt. (indicating)

MR. STEWART: Would the record please reflect he has identified the defendant.

THE COURT: It may.

Q. Now, approximately--or can you approximate how much time elapsed between the time that you made conversation or had conversation with the defendant? Well, let me put it this way; did a police officer arrive on the scene?

A. Yes, sir.

Q. How much time elapsed between the time the police officer--his coming on the scene and the defendant departing the scene?

A. I really couldn't say how much time. If I were to say shortly thereafter it may be something like three minutes --five mintes. You know, when you are waiting time

can seem to be a long time. And yet it wasn't--I would have to say just in plain terms, very shortly thereafter. And then as soon as the officer came over to there, I immediately went up and spoke to the officer and told him what had happened and that--

Q. What did you tell the officer? Did you give the officer a description of the individual you had been talking to?

13-14 A. I don't recall that I did at the time. I told him that I felt the man was very inebriated or very sick or not very much in possession of his faculties or ability to perform. And it was my feeling that he had taken off across the field.

13-16 PARTIAL TESTIMONY OF RANDY JABLONIC:

CROSS EXAMINATION BY ATTORNEY SIMONSON

Q. Actually, you do not recall the time that this incident occurred, do you?

A. In the back of my mind I remember thinking that--I told my wife something--I was going to be home. And I was trying to get home to the family, and I would have thought it was after--you know, it was dark. And it was raining. And it was later than I

had wanted to get home. And I don't recall if we mentioned a time here, but it seemed to me it was 8:30, or something like that--9:00. I don't specifically recall right here now.

Q. It could have been right around 8:30 or 8:00? Between 8:00 and 8:30?

A. If that is your pleasure. I don't recall distinctly the exact time that it occurred.

13-37 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

DIRECT EXAMINATION BY ATTORNEY STEWART

A. Well, what we saw on the way upstairs was wet and muddy tracks going, you know, to the bedroom. And arriving to the bedroom, that she showed us, we observed Mr. Welsh lying in bed with no clothes on, and muddy pants immediately next to the bed.

Q. All right, and what did you say, if anything, to Mr. Welsh?

A. We asked him to get up and put on his pants, and that we wanted to speak to him.

Q. Did he get up?

A. Yes, he did.

Q. And did he put his pants on?

A. Yes.

Q. And what happened after that?

A. In speaking with him we could notice the whole room smelled of alcohol. He had a very heavy odor of alcohol about his person. In speaking to him, his speech was very slurred, and so forth. And we had asked both the wife and stepdaughter, earlier, had he had anything to drink upon entering the home, and so forth. And they had told us no. We asked him if he had anything to drink, and he said, "No."

Q. Now, are you familiar with the breathalyzer machines?

13-38 A. Yes, I am. Not an operator.

Q. I know that. You understand that--you are trained, when you make an arrest for operating under the influence, that you should get that person downtown as soon as possible?

A. Yes.

Q. And do you know why?

A. Yes.

Q. Do you understand that--well, why do you have to get them down there as soon as possible?

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A. Well, because the alcohol dissipates in the body after a certain period of time. And there are requirements--I believe, it is two hours, that once you submit to the breathalyzer or some form of blood alcohol test, within two hours of the observed--drive him--or accident etc.

Q. Did you place Mr. Welsh under arrest?

A. Yes, we informed him he was under arrest at that point.

Q. Was that inside his house or outside?

A. Inside his bedroom.

Q. Now, prior to placing him under arrest, what observations--you mentioned some. What did you arrest him for?

A. Driving while under the influence of an intoxicant.

13-40 PARTIAL TESTIMONY OF POLICE OFFICER DALEY:

CROSS EXAMINATION BY ATTORNEY SIMONSON

Q. Your police report indicates that at 8:49--this was almost ten minutes to nine you were dispatched to the area. How is that time fixed in your records? Why did you pick that time, instead of some other time?

A. When a call comes into the police dispatcher, at the

point the information is given to the calltaker, they put a card in a time punch machine and record the time that they are speaking to the complainant. And at that point the card is given to the person dispatching the call, and they tell the squad which is the location that they should respond. And they also assign a case number to the incident at that point.

13-41

Q. So, the 8:45 is when the call came in?

A. I believe it was 8:49.

Q. Excuse me, 8:49 is when the call came in.

A. Yes.

Q. So, it takes--within a minute you were dispatched. Where were you located at that time?

A. I really couldn't say. I mean I was somewhere in the area. That was my patrol beat. And I would think maybe somewhere within half a mile or so maybe.

Q. So it would take a few minutes to get there nonetheless.

A. Yes.

Q. Anywhere from three to five minutes I suspect.

A. I would think from the time I was dispatched, to the to the time I arrived, might be a minute to two at the

very most.

Q. You arrived at the scene and you had a conversation with Mr. Jablonic?

A. Yes.

Q. Mr. Jablonic, I think, could not tell you how many people were in the car, could he?

A. I believe he did.

Q. Well, he didn't tell you he saw a driver--this man drive the car. He told you that a guy came from that area with this description and talked to him, didn't he?

13-42 A. No.

Q. It was raining that evening?

A. I believe so.

Q. Kind of bad weather--visivility was poor, nonetheless.

A. I believe the rain may have either stopped or started to just lightly drizzle at that point.

Q. But you personally did not--did not know who was driving the car?

A. Do you mean did I see him drive the car?

Q. Yes.

A. No.

Q. So you are relying upon what Mr. Jablonic told you?

A. Yes.

Q. Or what he observed, rather.

A. Yes.

14-34 PARTIAL TRANSCRIPT OF THE COURT'S FINDING BY JUDGE FRANKEL

THE COURT: It is further corroborated, as Mr. Stewart indicated, by the fact that his clothes were still wet in his bedroom, and that there was apparently fresh muddy footprints leading up the stairs to the defendant's bedroom. The Court would find, without having to address the consent issue, that: 1) The police did have probable cause to believe that the defendant had committed the offense of operating while under the influence; and further find that due to the exigent circumstances of the need to take a breath sample from the defendant in conjunction

14-35 with their reasonable hot pursuit, that there was a valid reason for entry into the defendant's home without a warrant in order to apprehend the defendant. This contrasts rather strongly with the last case, which is the case--which is the case that held that the warrantless arrest in one's home is unconstitutional, in which case the police officers

arrived at the defendant's home some 13 days after the defendant's involvement in the criminal transaction. Here it would appear that the officers arrived within 10 minutes of the defendant's leaving the scene. And then given the need to avoid dissipation of alcohol within the body, the officer certainly had an exigency that would have made obtaining a warrant in this case unreasonable, in the Court's view. The defendant seems to argue both ways: 1) That the case was old and cold and that greater periods of time had elapsed on the one hand; and on the other hand, saying there is plenty of time left within the two-hour period in which to get a warrant. And the defendant really cannot argue it both ways. The Court would find both probable cause for arrest and a valid exception to the warrant requirement that would require the Court to deny the defendant's motion to dismiss the complaint for lack of probable cause.

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STATE OF WISCONSIN

IN COURT OF APPEALS

APPELLATE DISTRICT NO. IV

CASE NO. 80-1686

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

EDWARD WELSH,

Defendant-Appellant.

Appeal From An Order Entered July 14, 1980, by the Hon. Mark A. Frankel, Judge, Dane County Circuit Court, Branch 12

Plaintiff-Respondent's Brief and Appendix

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ISSUE FOR REVIEW

Did the Trial Court have jurisdiction to hold a reasonableness hearing on the defendant's refusal to take a breathalyzer test where the defendant was arrested without a warrant inside his home?

The Trial Court Answered: Yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not believe the issues raised in this appeal warrants either publication or oral argument.

STATEMENT OF THE CASE

The Plaintiff-Respondent agrees with the statement of the Defendant-Appellant.

FACTUAL STATEMENT

On April 24, 1978, at approximately 8:30 p.m., the defendant was seen operating his motor vehicle east on Mineral Point Road, a divided roadway, in the City of Madison, County of Dane, State of Wisconsin, by Randy Jablonic. Jablonic was directly behind defendant, and followed the defendant east on Mineral Point Road for approximately one mile. Jablonic observed that the defendant was operating his vehicle very erratic, he weaved across the center line of the roadway several times. Defendant then strayed completely over the center line, and began traveling east in the westbound lane. He continued to do this for a short distance, then suddenly veered to the left into a cemetery, after nearly causing a headon collision with a westbound vehicle traveling in the westbound lane. Jablonic immediately stopped his vehicle and observed defendant get out of his vehicle and stagger in the direction of Jablonic's vehicle. Defendant approached Jablonic vehicle and asked Jablonic for a ride home. Jablonic noticed that defendant's speech was very slurred and

his balance was poor. Jablonic refused to take the defendant home. Defendant in a slurred conversation said to Jablonic, "you wouldn't get your cops"? Defendant then staggered off, walking north toward Tree Lane. Approximately five minutes after defendant's departure, Madison Police Officer Daley arrived at the accident scene. He spoke with Jablonic who told him about his observations of the defendant, and said that he thought the defendant was possibly under the influence. Daley immediately proceeded to the defendant's residence, 7158 Tree Lane, which he was familiar with after having been there two weeks prior on an alcoholic-related disturbance involving the defendant. Daley arrived at the defendant's residence at approximately 9:00 p.m. and he was admitted into the house by the defendant's daughter and wife. They advised Daley that the defendant had just arrived and was upstairs. The defendant's wife directed Daley to the defendant and told Daley she was concerned about the defendant's alcoholic problem and said, "something has to be done." Daley then entered their bedroom where he found the defendant intoxicated. The defendant was arrested under Sec. 346.63(1) and subsequently requested to take a breath test under Sec. 343.305. Defendant refused.

I. ARGUMENT

The Appellant argues that his warrentless arrest was unconstitutional and unlawful because it was made inside his residence. Respondent disagrees. It is Respondent's

position that a lawful arrest can be made inside the reidence of the arrested person, without a warrant, so long as the arrest is based on probable cause and made under exigent circumstances. Laasch v. State, 84 Wis. 2d 587, 267 N.W. 278 (1977).

A. ARREST BASED ON PROBABLE CAUSE

Wisconsin Statute Section 968.07(1)(d) authorizes police officers to make arrests without arrest warrants. It provides that a law enforcement officer may arrest a person when there are reasonable grounds to believe that person is committing or has committed a crime. In the present case, the defendant was arrested by Officer Daley and charged with violating Section 346.63(1) of the Wisconsin Statutes, Operating A Motor Vehicle While Under the Influence of An Intoxicant or Controlled Substance. There are two elements to that crime.
1) The defendant must have been operating a motor vehicle on a highway in the State of Wisconsin; and
2) The defendant while operating his vehicle must have been under the influence of an intoxicant or controlled substance.

Therefore, the question before the trial court in the present case was whether or not Officer Daley had probable cause to believe that the defendant had violated Section 346.63(1) when he was arrested. The trial court held that he did. Respondent agrees. Probable cause was defined in Kluck v. State, 37 Wis. 2d 378, 155 N.W. 2d 26 (1967):

> "Probable cause exists if the facts and circumstances known to the police officer warrant a prudent man in believing that an offense has been committed. It refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime."

In State v. Paszek, 50 Wis. 2d 619, 624-625, 184 N.W. 2d 836 (1971) the Court defined probable cause for an arrest as being:

> "probable cause to arrest refers to that quantum of evidence which would lead a police officer to believe that the defendant probably committed a crime. Henry v. U.S. (1959), 361 U.S. 98. It is not necessary that the evidence giving use to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility. Browne v. State, supra, and it is well established that the belief may be predicated in part upon hearsay information. Draper v. U.S., 358 U.S. 307 (1959). The quantum of evidence which constitutes probable cause to arrest must be measured by the facts of a particular case. Wong Sun v. U.S. (1963) 371 U.S. 471." (emphasis added)

The Respondent believes that the facts and information that Officer Daley possessed at the time he arrested the defendant were sufficient enough to warrant a prudent man in believing the defendant had probably been operating his automobile in violation of Section 346.63(1). Shortly before arresting defendant, Randy Jablonic gave Officer Daley the following information:

1) Defendant was operating his motor vehicle on a highway in the State of Wisconsin;

2) Defendant was operating his motor vehicle in a very erratic manner, and nearly caused a serious traffic accident;

3) Defendant left his motor vehicle in the cemetery;

4) Defendant staggered when he walked and was very unsteady;

5) Defendant's speech was very slurred;

6) Defendant had just left the area, heading in the direction of Tree Lane;

7) Defendant's physical description; and

8) His belief that defendant was possibly under the influence of an intoxicant or controlled substance.

There can be no question that Jablonic's information, if reliable, meets the probable cause standard set in Paszek, supra. The trial court viewed Jablonic's hearsay information as being credible, as the Court concluded that Jablonic was a citizen informant. In Paszek, information given to the police by a citizen informant, which demonstrated that the informant was in a position to see what he claims he saw, was enough to establish its reliability.

B. AN IN HOUSE ARREST IS PERMISSIBLE IF ENTRY WAS EITHER CONSENSUAL OR BASED ON EXIGENCY.

In the present case the trial court ruled that Officer Daley had probable cause to arrest the defendant for Operating A Motor Vehicle While Under the Influence Of An Intoxicant. The Court also held that the in house arrest of the defendant was permissible because it was based on "hot pursuit" and exigent circumstances. The trial court ruled that the facts in the present case fit the guidelines set for in house arrests spelled out in Lasch, supra.

> "The state identifies no exigent circumstances necessitating a warrantless entry, and the record is barren of any evidence of exigency. The arrest was not made in "hot pursuit"; there was no threat to the safety of other persons; there was no risk that evidence would be destroyed, since the delivered substance had been seized at the time of the previous arrest; and any suggestion that the police feared that the defendant would flee is dispelled by the fact that she had been released for approximately two weeks."

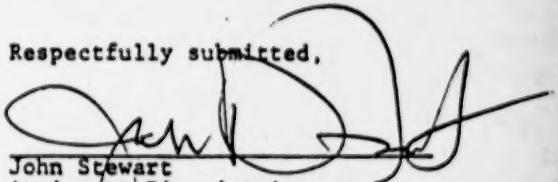
In the instant case, Officer Daley arrived at defendant's home within minutes of defendant. Although he was invited in by defendant's daughter and wife, the trial court held that Daley would have been justified to enter defendant's home without consent. The court recognized the necessity for Officer Daley to make a quick arrest of defendant so that defendant would be taken to the police station for the purpose of taking a breathalyzer test under Sec. 343.305. This would avoid the possible destruction of evidence of a crime as mentioned in Laasch. This rationale followed closely the holding in State v. Bentley, 92 Wis. 2d 860, 286 N.W. 153 (1979), where the court held that because blood rapidly metabolizes alcohol after a person ceases drinking, that fact creates an exigent situation so as to prevent the possible destruction of evidence.

CONCLUSION

For all the above-stated reasons, the Respondent submits that the Appellant has failed to show that the trial court

did not have personal jurisdiction to conduct his reasonableness hearing and therefore judgment of the trial court should be affirmed.

Respectfully submitted,



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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

ARGUMENT

I. THE RESPONDENT UNFAIRLY DISTORTS THE ISSUE WHEN HE ASSERTS THAT THE POLICE WERE GIVEN CONSENT TO ENTER THE APPELLANT'S HOME.

The respondent attempts to establish on Pages 3, 6 and 7 of his brief that the police were granted permission to enter the appellant's home by his wife and daughter. This assertion unfairly misconstrues the issue while allowing the respondent's argument to appear more tenable. The

Trial Court, however, explicitly did not address the issue of consent in reaching its decision to suspend the appellant's operating privileges for 60 days because it was not in issue nor litigated. The Appellate Court is therefore precluded from considering this issue. (R. 14-34, A. App. 115.

The only dispositive issue here is whether exigent circumstances justified the warrantless arrest of appellant by the police inside the privacy of his home. If such circumstances did not exist, the appellant's arrest was unlawful and the Trial Court did not have jurisdiction to hold a reasonableness hearing.

II. THE APPELLANT'S IN HOUSE WARRANTLESS ARREST WAS UNLAWFUL ABSENT EXIGENT CIRCUMSTANCES.

The level of generality respondent uses to address the issue of exigent circumstances seriously flaws his argument. Admittedly, the police had probable cause based on the information and belief of Jablonic to investigate whether the appellant had been operating a motor vehicle while intoxicated. There was not at that time, however, any exigent circumstance to justify a warrantless police entry into appellant's home to determine whether he had committed such an offense.

The respondent's argument to the contrary on this issue is constitutionally unsound. This is nowhere more apparent than in respondent's brief recitation of the hold in State v. Bentley, 92 Wis. 2d 860, 286 N.W. 2d 153 (1973). Even on a high level of generality there is utterly no similarity between the exigent circumstance in Bentley, a five count felony case, and

the assertgd exigent circumstances in this case which is a minor misdemeanor charge. The constitutional underpinning of this case require a more precise analysis of the issue.

An exigent circumstance claim must be sufficient enough to outweigh and except the individual's Fourth Amendment right to be secure in the privacy of his home. Indeed, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 1380 (1980).

The asserted exigency in this case by the respondent and the Trial Court does not pass this constitutional test. The causal connection between the State's right to investigate the alleged offense and the assertion that a Bentley type exigency allowed the police to lawfully arrest the appellant without a warrant inside his home is constitutionally absurd. The connection and resultant analysis are simply too tenuous. In short, the respondent would have this Court rule that the police may warrantlessly enter an individual's home to investigate whether he had been operating a motor vehicle intoxicated, and upon discovery of that fact, arrest him on the exigent grounds that his intoxication may soon wear off.

III. IT IS UNSOUND POLICY TO ALLOW WARRANTLESS MISDEMEANOR ARRESTS OF DRIVERS WHO THE POLICE DID NOT OBSERVE OPERATING A MOTOR VEHICLE WHILE INTOXICATED.

Even if substantial constitutional considerations were not present in this case, it would be unsound policy for the Court to allow warrantless misdemeanor arrests of individuals who the police did not observe operating

a motor vehicle while intoxicated. The connection between an intoxicated individual and the unestablished fact that he had operated a motor vehicle is again quite tenuous. The Supreme Court of our neighbor state of Minnesota has held that the warrantless arrest of an individual for misdemeanor operation of a motor vehicle while intoxicated is unlawful "under circumstances where the offense was not committed in the presence of a police officer." State v. Cormican, 292 Minn. 505, 506, 195 N.W. 2d 586 (1972). We respectfully submit that that is a good law which should be adopted by the State of Wisconsin.

CONCLUSION

The Court, for reasons advanced in this brief and in the appellant's original brief, should reverse the order of the Trial Court suspending appellant's operating privileges and order the defendant-appellant's driving privileges be reinstated.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
Case No. 82-5466

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

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REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT
OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment as applicable to the states by virtue of the Fourteenth Amendment, which is quoted in the petition for writ of certiorari.

Section 345.22 Wis. Stats. (1977) which is quoted in the State's Response to the Petition.

Section 345.20(1)(a), Wis. Stats. (1977), which provides:

> "Traffic regulation" means a provision of chs. 341 to 349 for which the penalty for violation is a forfeiture, or an ordinance enacted in accordance with 349.06.

ARGUMENT

In its Response to the Petition for Writ of Certiorari the State of Wisconsin argues that the precise question raised in the Petition was not properly raised in the lower courts and therefore this Court cannot address the question. The question as set forth in the Petition is:

> "Do the Fourth and Fourteenth Amendments prohibit police from making a non-consensual warrantless night entry into a person's home to arrest him for a violation of a non-jailable

traffic offense committed outside the presence of the police?"

The State argues that the case was treated as a misdemeanor rather than a non-jailable, i.e. civil, traffic offense and that therefore this Court is precluded from reviewing the question presented by the Petition.

By the Court's own rule "the question presented will be deemed to comprise every subsidiary question fairly included therein." Supreme Court Rule 21.1(a). Quintessentially the question presented and fairly included therein, is the sort of emergency or dangerous situation, i.e., the degree of exigency, if any, which will justify a warrantless non-consensual entry into the home of a citizen. This is the exact question left open by this Court in Payton v. New York, 445 U.S. 573, 583 (1980).

From the beginning petitioner challenged the validity of the arrest in the home based on lack of consent, and lack of exigent circumstances. Wisconsin Supreme Court Brief of State of Wisconsin, p. 2, R-Ap. 223. The State in its Response at page 2 agrees that the petitioner argued to the Wisconsin Court of Appeals that the arrest was invalid because the police did not possess probable cause and no exigent circumstances existed. Furthermore at page 5 of the petitioner's Wisconsin Court of Appeals brief the argument regarding the civil nature of the arrest was precisely raised.

> "In the present case, the entry of the defendant's dwelling without consent was to effect a warrantless arrest in a civil-type of special proceeding. It is highly doubtful whether the seriousness of this offense under any circumstance could justify such an intrusion into one's home by the state; especially where the police went to the defendant's home initially to only investigate the possibility of such an offense." R-Ap. 238.

The State's brief to the Court of Appeals ignored the civil nature of the arrest and argued at pages 3-4 that probable cause and exigent circumstances would justify a warrantless entry into the home to effect an arrest, apparently no matter how minor the underlying offense. R-Ap. 265-66. The petitioner's reply brief at page 2 argued that the police had only probable cause to investigate, not to arrest, and that the level of generality urged by the State on the issue of exigent circumstances was "constitutionally unsound." R-Ap. 274.

While the State and the Wisconsin Court of Appeals failed to note that the arrest in this case, as opposed to the charge, was for a civil offense, there can be no doubt that the issue joined by the parties and addressed by that court concerned the weight which should be given to the nature of the offense when determining whether or not "exigent circumstances" existed which would justify a warrantless entry into the home to effect an arrest.

Judge Gartzke writing for the Court of Appeals may well have viewed the arrest, as well as the charge, as being for a misdemeanor but even if he viewed it as such, he used a balancing test (R-Ap. 145) and ruled that the need to effect the arrest in this case was not so compelling, i.e., the circumstances were not so exigent, as to justify an intrusion into the sanctity of the home.

On review to the Wisconsin Supreme Court the State argued that the Court of Appeals placed undue emphasis on the seriousness of the crime and argued that the category of probable cause and exigent circumstances is sufficient to validate a warrantless arrest in the home regardless of the nature of the offense. Wisconsin Supreme Court Brief of State of Wisconsin, p. 14, R-Ap. 171. The petitioner took issue with this proposed

category approach by adopting Judge Gartzke's opinion and analysis in his brief. Wisconsin Supreme Court Brief of Defendant-Appellant, p. 7, R-Ap. 213. He also argued as noted by the State's Response at page 3 that the police lacked probable cause to believe a crime had been committed since there was no evidence in the record that the police knew that this was anything other than a first offense under §346.63(1), Wis. Stats. (1977). The State responded to this latter argument by the alternative arguments of waiver of the issue or authority to arrest for the traffic regulation violation under §345.22, Wis. Stats. (1977) State's Response, p. 3-4.

Section 345.22, Wis. Stats. (1977), allows the police to make a warrantless arrest for a violation of a traffic regulation and the definition of traffic regulation in §345.20(1)(a) indicates that violations of such regulations carry penalties of forfeitures only. Hence, in addressing the merits of the petitioner's argument the State conceded that the arrest here was for a civil offense.

The majority opinion of the Wisconsin Supreme Court ignored the State's waiver argument, treated the arrest as one for a civil forfeiture violation, and held that the police had authority to arrest both under §345.22, Wis. Stats. (1977) because the case met the statutory probable cause standard, and under its view of case law requirements for probable cause coupled with exigent circumstances. 108 Wis. 2nd 326 n. 5, R-Ap. 108.

In reaching this conclusion regarding probable cause and the authority to arrest, the majority assumed the constitutionality of the statute and ignored the protestations of the dissenters who doubted authority under the Wisconsin law to effect a warrantless arrest for a civil offense committed outside the presence of the police. R-Ap. 126.

The majority opinion further went on to analyze the validity of the arrest by the probable cause and exigent circumstances categories of hot pursuit, threat to safety, and destruction of evidence urged by the State in its briefs and set forth by this Court in felony cases. The majority opinion (as the State correctly points out in its Response at page 4) does not discuss whether the requirements for a valid warrantless arrest in the petitioner's home differ depending on whether the arrest was for a felony, a misdemeanor, or a civil forfeiture offense but the majority by its recognition of the civil nature of the arrest and its citations to felony case law held that the requirements do not differ.

Having failed to address the civil arrest issue when raised by the petitioner in his Wisconsin Court of Appeals brief and having succeeded in its attempt to get the Wisconsin Supreme Court to adopt its suggested approach to warrantless arrest analysis in the factual context of the instant case, the State should not now be arguing to this Court that the question presented in the Petition should not and cannot be reviewed by this Court.

Certainly the issue of exigent circumstances, i.e., the sort of emergency or dangerous situations, which will justify a warrantless non-consensual entry into the home of a citizen to effect an arrest was raised by the petitioner in all the lower courts, was argued by the parties and decided by the courts at all levels. No matter whether this Court views the case as involving a misdemeanor or a civil forfeiture violation and no matter what decision this Court reaches on the precise question stated in the Petition and any other "subsidiary questions fairly included therein," the exigent circumstances issue is properly before this Court.

Finally the State argues that the petitioner's reference to the lack of evidence in the record regarding the time it would take to obtain a warrant raises only a question of the sufficiency of the evidence to support the court's finding of exigent circumstances. Such questions it argues are not normally the type of question which this Court reviews on certiorari. State's Response at p. 8. But the amount and type of evidence needed to support legal conclusions of exigent circumstances of hot pursuit, threat to safety, and destruction of evidence are subsidiary questions fairly included within the question of exigent circumstances and may also be reviewed by this Court.

CONCLUSION

For the reasons tendered here, petitioner requests the Court to grant his petition for a writ of certiorari.

Petitioner argues that this is a case deserving summary reversal of the decision of the Supreme Court of Wisconsin.

Dated this 17th day of December, 1982.

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No. 82-5466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD G. WELSH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF PETITIONER

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QUESTION PRESENTED

Can police, without a warrant and without consent, enter a suspect's home at night to arrest him for a nonjailable traffic offense committed outside the presence of the police?

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No. 82-5466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDWARD G. WELSH,

PETITIONER,

v.

STATE OF WISCONSIN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF PETITIONER

OPINIONS BELOW

The decision of the Wisconsin Supreme Court in this case is reported as State v. Welsh, 108 Wis. 2d 319, 321 N.W.2d 245 (1982). It is reproduced in the Joint Appendix at p. 126. The decision of the Wisconsin Court of

Appeals in this case is unreported. It is reproduced in the Joint Appendix at p. 114.

JURISDICTION

The opinion of the Wisconsin Supreme Court of July 2, 1982, affirmed a Circuit Court order suspending Welsh's automobile operating privileges for an unreasonable failure to take a chemical test for intoxication. That order is stayed pending a decision by this Court.

The petition for a writ of certiorari was mailed on September 24, 1982 and docketed in this Court on September 27, 1982. The Petition was granted on February 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of applicable constitutional and statutory provisions form the Petitioners Appendix at the end of this brief (A:1-6).

The following constitutional and statutory provisions are cited:

United States Constitution:

Amendment IV

Amendment XIV

Ariz. Rev. Stat. Ann., Sec. 13-3914(c) (1982)

Calif. Pen. Code Sec. 1526(b)

Calif. Pen. Code Sec. 1528(b) (West Supp. 1981)

Fed. Rules Crim. Proc. 41(c)(2)

Wis. Stat. (1975) 343.305

Wis. Stat. (1975) 345.20

Wis. Stat. (1975) 345.22

Wis. Stat. (1975) 345.24

Wis. Stat. (1975) 346.63

Wis. Stat. (1975) 346.65

Wis. Stat. (1977) 885.235

Wis. Stat. (1977) 968.07

STATEMENT OF THE CASE

A. SUMMARY

Without establishing consent to enter, police arrested Edward Welsh without a warrant in his home in Madison, Wisconsin at 9:00 p.m. on Monday, April 24, 1978. He was charged with operating a motor vehicle while intoxicated in violation of § 346.63(1)(a) Wis. Stat. (A:2-3).[1] Welsh, who was naked

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[1]The first Complaint was dismissed on July 19, 1978, because the City of Madison was not the proper complainant. A second Summons and Com-

in his bed when police entered the family home, was there confronted by police who purposefully entered either to arrest him, or to investigate. (J.A. 46, 78, 101). He was taken to the Madison police station where he refused to take a breathalyzer test. This test is required by Wisconsin's Implied Consent Law (§343.305(2)(b) Wis. Stat., A:5).

Edward Welsh's arrest and his ensuing refusal to take a breathalyzer test

---

plaint, charging a misdemeanor, was issued by the State of Wisconsin on August 15, 1978. On February 20, 1980, a hearing was held on motions to dismiss. Welsh appeared along with his wife and one of his stepdaughters (J.A. 12, R.13:6). The State appeared, had no witnesses, and requested an adjournment. The State's request for an adjournment was denied. The defendant then moved for dismissal which the Judge granted on February 22, 1980. The Judge dismissed the State's complaint without prejudice. On February 25, 1980, the State charged the defendant for the third time.

resulted in two linked proceedings: one criminal and the other civil.

First, he faced a criminal charge for the second offense of operating a motor vehicle while intoxicated. A second offense is a misdemeanor, § 346.65(2) Wis. Stat. 1975 (A-3). No evidence, however, shows that the Madison police knew of any prior conviction when they entered the Welsh home.

The second proceeding, leading to this Court, began with the hearing on Welsh's claim that his refusal to take the breathalyzer test was reasonable, and hence that his operating privileges should not be suspended. (J.A. 91).

B. THE HEARING ON THE MOTION TO SUPPRESS EVIDENCE IN THE CRIMINAL CHARGE OF OPERATING A MOTOR VEHICLE WHILE INTOXICATED

On July 14, 1980, a hearing was held on motions relating to the misdemeanor

charge of operating a motor vehicle while intoxicated. Defendant asserted lack of personal jurisdiction because of the warrantless in-house arrest (J.A. 13).[2]

The defendant claimed the state's delays in bringing him to trial denied him a fair hearing. In the interval his two teenaged stepdaughters who were vital witnesses to the issue of consent had left home and were unavailable to testify (J.A. 17). The Court ruled that the consent issue would be irrelevant if the State could show that the police had probable cause and that exigent circumstances or hot pursuit justified the warrantless arrest. (J.A. 20-22)

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[2]Under Laasch v. State 84 Wis. 2d 587, 267 N.W.2d 278 (1978), an invalid arrest deprives a court of personal jurisdiction. Contra, Ker v. Illinois, 119 U.S. 436 (1886).

Three witnesses testified on the facts leading to the entry and arrest: Randy Jablonic, Officer Richard Daley, and Patricia Welsh, the defendant's wife.

Jablonic testified that between 8:30 and 9:00 P.M. on April 24, 1978 when it was dark, raining and visibility was bad he saw the defendant's car operate erratically, veer off the road, and stop in a field or cemetery (J.A. 25-26 R.13:9). No damage or injury occurred.

According to Jablonic the defendant unsteadily approached Jablonic's truck and asked for a ride home which Jablonic refused to supply. (R.13:11) Jablonic did not smell the defendant's breath (R.13:11) but he testified that the defendant's speech was slurred and he seemed very concerned that Jablonic would call the police (R.13:11,12). After again asking for a ride, and again being refused, the defendant walked away

(J.A. 27).

The police, who had been called by a passing driver, arrived three to five minutes later (J.A. 23, 24, 26). Officer Daley testified that he was sent to the scene at 8:49 P.M. and talked with Jablonic for about five minutes.[3] (J.A. 29) A license plate check on the vehicle revealed registration to the defendant, who lived close by (J.A. 31). Daley recalled having arrested Welsh a week or two earlier at his home for an alcohol-related disturbance (J.A. 34).

It took Daley "a minute or a minute and a half at the most" to drive to the Welsh home (J.A. 34). Officer Daley and another policeman knocked at the door

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[3]From the record it is unclear exactly what Jablonic told Officer Daley upon which the police could determine probable cause. 108 Wis. 2d at 348, 321 N.W.2d at 260 J.A. 190. (Abrahamson, J., dissenting)

which was answered by one of the defendant's stepdaughters (J.A. 35). Daley testified that he intended to arrest Welsh, or at least further investigate (J.A. 85, 86). Daley said the stepdaughter opened the door and beckoned them toward the stairs (J.A. 37). He also testified that as they were going up the stairs, Mrs. Welsh came from the kitchen and gave her consent to their entry (J.A. 38, 39).

Daley testified that in the bedroom he saw the defendant lying naked in bed with muddy pants at the side of the bed. (J.A. 44) He ordered the defendant to get up and put his pants on because they wanted to speak to him. (J.A. 44) Daley said that the whole room smelled of alcohol and that the defendant' speech was slurred. (J.A. 44). Daley arrested the defendant, after he put on his trousers, for oper-

ating a motor vehicle while under the influence of intoxicants (J.A. 45, 98).

In court, Daley answered that he understood that when an arrest is made for operating under the influence the person should be brought downtown as soon as possible for a breathalyzer test. He said that the test must be taken within two hours of the observed violation. (J.A. 45-46)

Mrs. Welsh testified that she had been upstairs when the police arrived (J.A. 51); that she remembered "everything being really confused" when they entered; (J.A. 53) and that she did not give her consent for them to enter (J.A. 56).

The Judge made no findings on whether the entry was consensual. (J.A. 21-22, 80) He found that three policemen had arrived at the Welsh home within ten minutes of leaving the scene (J.A.

79, 102-103) and held that the warrantless arrest was valid because the police had probable cause to believe that the defendant had committed the offense of operating while under the influence and that reasonably hot pursuit and exigent circumstances justified entry. (J.A. 79-80) The petitioner's motion to dismiss the complaint was denied. (J.A. 79-81)

C. THE REASONABLENESS HEARING

On September 5, 1980, a hearing was held before the same judge to determine whether the Welsh's refusal to take the breathalyzer test was reasonable. (J.A. 91-113) The defendant again argued that the arrest was invalid and that therefore his refusal to take the test was

reasonable (J.A. 102-105).[4] (J.A. 92, 102)

The Judge held that the arrest was valid because his decision in the earlier July 14th hearing was binding. (J.A. 111). He concluded that Welsh's refusal to take the breathalyzer test was unreasonable and ordered suspension of Welsh's operating privileges for sixty days (J.A. 112-113).

D. OPINION OF THE WISCONSIN COURT OF APPEALS

Welsh appealed the order suspending his license to the Wisconsin Court of Appeals where he once again argued that the warrantless arrest was invalid.

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[4]Wisconsin law was amended effective July 1, 1978 to require the State to show that a person ordered to submit to a chemical test was lawfully arrested § 343.305(8)(b)(1)(a). Ch. 193 sec. 7, Laws of 1977. The hearing in this case was held under the 1975 laws.

Judge Gartzke applied a balancing test and ruled that the need to arrest was not so compelling as to justify an intrusion into the home. (J.A. 121-122) Because the trial court made no findings on consent, the Court remanded for findings on that issue. (J.A. 124-125)

E. OPINION OF THE WISCONSIN SUPREME COURT

The majority opinion of the Wisconsin Supreme Court rests on two prongs. First that Officer Daley had sufficient information to establish probable cause that Edward Welsh violated the traffic regulation forbidding driving while intoxicated. Second, that the immediate need for a blood alcohol test justified a pursuit and a warrantless nonconsensual entry to make an arrest. The majority determined

that the invasion was reasonable under the circumstances, 108 Wis. 2d at 328, 321 N.W.2d at 250 citing Brown v. Texas, 443 U.S. 47, 50-51 (1979). The Court rejected Welsh's argument that probable cause was lacking. The public interest favoring an entry to arrest was supported by the Wisconsin Supreme Court's citation of the pervasive problem posed by intoxicated drivers 108 Wis. 2d at 334, 321 N.W.2d 253, J.A. 157-159.

Exigent circumstances existed because of three factors: (1) the hot pursuit of the defendant 108 Wis. 2d at 336, 321 N.W.2d at 254, J.A. 161; (2) the imminent threat to public safety, id. at 336 (J.A. 164); and (3) the urgency involved in arresting the suspect in order to preserve evidence of a statutory violation. Id. at 338 (J.A. 165).

The Wisconsin Court, relying on Professor LaFave, stated that when officers are engaged in an investigation in the field there should be a presumption favoring a warrantless arrest, 2 LaFave, Search and Seizure, § 6.1 at 392.

The Wisconsin Supreme Court reversed the decision of the Court of Appeals and affirmed the Circuit Court's order suspending the petitioner's operating privileges.

The dissenting opinion (Abrahamson, J., and Heffernan, J. concurring) concluded that Welsh's arrest violated both Federal and State constitutional standards because: 1) the arrest was for a civil offense; 2) there were grave doubts as to the constitutionality of a warrantless intrusion into the home to arrest for such an offense not committed in the officer's presence; 3)

probable cause to arrest was lacking; and 4) exigent circumstances did not exist. 108 Wis. 2d at 339-358, 321 N.W.2d 255-264, J.A. 168-213).

Welsh petitioned for a Writ of Certiorari which was granted on February 22, 1983.

SUMMARY OF ARGUMENT

This case involves a warrantless nonconsensual, nighttime entry into the home of Edward Welsh by police who suspected him only of violating a law calling for a civil forfeiture and loss of driving privileges.[5]

The Wisconsin Supreme Court held

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[5]Evidence obtained from the entry and arrest, namely, testimony that Welsh was intoxicated, was used in the ensuing misdemeanor trial for driving while intoxicated. The misdemeanor conviction is now on appeal to the Wisconsin Court of Appeals and is stayed pending decision in this case.

that because the police had probable cause to arrest coupled with exigent circumstances, they had adequate grounds to enter the suspect's house to make an arrest for a traffic violation even though it was not committed in the officers' presence. This holding conflicts with the common law and is an unprecedented invasion of the privacy of the home.

This Court has repeatedly stated that home entries, without consent, and without a warrant are presumptively illegal. This entry, moreover, was at night to arrest for a minor offense. Such entries are per se illegal.

In justifying the warrantless nighttime intrusion into the home, the Wisconsin court placed heavy emphasis on the seriousness of the drunk-driving problem and the immediate need to preserve evidence of the accused's blood

alcohol content. In focusing on the seriousness of the drunk-driving problem the court in essence created an exception to the warrant requirement similar to the "murder scene exception" which this Court struck down in Mincey v. Arizona, 437 U.S. 385 (1978).

The court found exigent circumstances of hot pursuit, imminent threat to public safety, and urgency based upon the need to preserve the evidence. None of these circumstances were extant. The offense was a minor offense, as determined by the Wisconsin legislature, and it was committed outside the presence of the police thus precluding a finding of hot pursuit. The defendant was home in bed when the police arrested him thus making any "imminent threat to public safety" specious speculation. Finally, the urgent need to preserve evidence did

not exist because (1) the need to preserve evidence of a minor offense can never justify a warrantless nighttime entry into the home; (2) the defendant was outside the presence of the police for a sufficient time in which to destroy the evidence by continuing to drink; (3) if he did not continue to drink, there was ample time to get a warrant for his arrest.

The State failed to show that a warrant could not be obtained. Warrants might even have been obtained by the use of the telephone procedure allowed under the Federal Rules and not forbidden explicitly in Wisconsin.

While the entry was peaceful, the situation was instinct with coercion. No decision on whether consent justified the entry was made. This Court should reverse the Supreme Court of Wisconsin.

ARGUMENT

I. THE ULTIMATE PURPOSE OF THE FOURTH AMENDMENT IS TO PROTECT THE PRIVACY OF PERSONS IN THEIR HOMES

A. WARRANTLESS NON-CONSENSUAL HOME ENTRIES AT NIGHT ARE PRESUMPTIVELY ILLEGAL

Law places sharp limits on police entry into a home, whether to inspect, to search or to arrest. Without warrants such entries are presumptively unreasonable. United States v. Knotts, ___ U.S. ___, 103 S.Ct. 1081, 51 U.S.L.W. 4232, 4234, March 2, 1983; United States v. Johnson, ___ U.S. ___, 102 S. Ct. 2579, 2589 n.14, 73 L.Ed.2d 202, 216 n.14 (1982). Even if a right to enter exists, it is greater for felonies than for misdemeanors, and greater during the day than at night.[6] The majority of this Court

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[6]". . . it is difficult to imagine a more severe invasion of

in Payton v. New York, 445 U.S. 573 (1980) did not disagree with Justice White's summary of the common law.

> "At common law, absent exigent circumstances, entries to arrest could only be made for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors. Further, it seems generally accepted that entries could be made only during daylight hours."

Payton v. New York, 445 U.S. at 616 (White, J., dissenting). With respect to minor offenses a comprehensive review of common law cases concluded that:

> "[S]ince neither an officer nor a citizen has authority to arrest for a past breach of the peace without a warrant, neither would have the right to break doors in an attempted arrest therefore, except for one committed in his presence and on fresh pursuit." (emphasis added)

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privacy than the nighttime intrusion into the private home that occurred in this instance." Jones v. United States, 357 U.S. 493, 498 (1958).

Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 803 (1924).

Except that the case before this Court involves a minor offense, its facts are strikingly close to those in Johnson v. United States, 333 U.S. 10 (1948), wherein this Court expressly failed to find any "exceptional circumstances" justifying relaxation of the warrant command. After receiving a tip from a known opium user that opium was being smoked in a hotel room, police went to the hall outside and at around 9:00 p.m. smelled the distinctive odor of opium emanating from the suspect's room. After knocking at the door the police entered without consent, and arrested the defendant. This Court noted that there might well have been sufficient probable cause to justify a warrant (333 U.S. at 13). However, the Court continued:

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

333 U.S. at 14. This Court rejected the argument that Johnson's arrest was necessary because of exceptional circumstances.[7]

The premise underlying discussion of the warrant requirement in the Johnson case is that the doctrine of exceptional circumstances must not be permitted to swallow the general rule

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[7]"No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction." 333 U.S. at 15.

which requires a neutral and impartial evaluation of the need for an instrusion into a home.

The Johnson decision explicitly confirms the need for a neutral and dispassionate evaluation.[8]

Following the rule of the Johnson case, this Court in McDonald v. United

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[8]"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing." 333 U.S. at 13-14.

States, 335 U.S. 451 (1948), once again declined to find exceptional circumstances in a case involving a warrantless entry to arrest for gambling operations. Police entered the defendant's room after peering through a transom and hearing the suspicious noise of an adding machine (characteristically used in those days in numbers operations). The Court confirmed the presumptive invalidity of warrantless entries, the value of obtaining a warrant, and the absence of an emergency.

> "This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law."

335 U.S. at 454. The Court stressed the importance of magisterial intervention to protect Fourth Amendment

values.[9]

B. ENTRIES FOR MINOR OFFENSES REQUIRE WARRANTS

The Wisconsin Supreme Court stated that arrest authority rested only on its statute authorizing arrests for traffic regulations, Wis. Stat. 345.22 (A:2) 108 Wis. 2d at 326 n. 5, 321 N.W.2d at 249 n.5, J.A. 140).[10]

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[9]"The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law." 335 U.S. at 455-6.

[10]Wisconsin's criminal arrest statute, on which the Court did not rely, is 968.07 Wis. Stat. Traffic regulations are defined as penalized by forfeitures. 345.20(1)(a) Wis. Stat. (A-2). A few states authorize warrantless misdemeanors arrests although not committed in the presence of an offi-

Without discussion or citation of authority the Supreme Court of Wisconsin rejected the teachings of the common law,[11] and the wisdom of the ALI Model Code of Pre-Arraignment Procedure.[12]

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cer. See Appendix X, Model Code of Pre-Arraignment Procedure.

[11]Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 803 (1924). See Kurtz v. Moffitt, 115 U.S. 487, 498-9 (1885); Queen v. Mardsden (1868) L.R. 1 C.C.R. 131 holding that a recent assault on a constable did not justify a later home invasion to arrest.

[12]ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1(1) (1975) provides:

(1) Authority to Arrest Without a Warrant. A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed

(a) a felony;

(b) a misdemeanor, and the officer has reasonable cause to believe that such person

(i) will not be apprehended unless immediately arrested; or

(ii) may cause injury to himself or others or damage to property unless immediately

The dissenters recognized the civil nature of the offense, recognized it was not committed in the officer's presence, and said it could find no cases authorizing such a warrantless arrest. 108 Wis. 2d at 144, 321 N.W.2d at 258, J.A. 180. The dissent doubted that the defendant could have been arrested even outside his home, and doubted that such a prohibition would hamper effective law enforcement.

The question of the constitutionality of an arrest outside the home for this offense is not before this Court unless the Wisconsin statute authorizing the arrest is invalid on its face. Defendant argues that it is unconstitutional to interpret the Wisconsin traf-

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arrested;
or
(c) a misdemeanor or petty misdemeanor in the officer's presence.

fic arrest statute to allow a warrantless entry at night into the home for a minor offense.

This Court noted the existence of greater arrest powers in felonies and lesser for misdemeanors in Carroll v. United States, 267 U.S. 132 (1925), stating as the rationale:

> "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant."

267 U.S. at 157.

Justice Jackson, concurring in McDonald, called attention to the gravity of the underlying crime as a factor in evaluating warrantless home entries.

> "It is to me a shocking proposition that private homes, even quarters in a tenement, may be

> indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it."

335 U.S. at 459.

In United States v. Watson, 423 U.S. 411 (1976) and in Payton v. New York, 445 U.S. 573 (1980) this Court analyzed the history of the Fourth Amendment and the common law at the time of its enactment. In Watson the Court concluded that a warrantless arrest, on probable cause, in a public place for a felony was constitutional. In Payton, the Court addressed a question left open in Watson and concluded that a warrantless arrest, on probable cause, in the home for a felony was unconstitutional absent consent to enter or exigent circumstances. In those two cases, this Court drew a "firm line" for law enforcement officers, namely, the home.

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

445 U.S. at 590. For minor offenses, that line may not be crossed without a warrant.

Both Watson and Payton recognized that the common law rules of arrest had been carried into the Fourth Amendment guarantees against unreasonable searches and seizures, i.e. a warrantless arrest not permitted by the common law was constitutionally unreasonable.

Everyone in Watson agreed that the common law of arrest commanded that:

> a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.

423 U.S. at 418 and 438.

At common law, a peace officer was not permitted to arrest without a warrant for misdemeanors not committed in his presence. Even if the misdemeanor was committed in his presence the officer was only allowed to make a warrantless arrest if it was a breach of the peace and he gave immediate and continuous pursuit.

The common law's focus on the severity of the crime, felony or misdemeanor, gave rise to the exigent circumstances doctrine. For a misdemeanor the only exigent circumstance justifing a warrantless arrest was severity rising to the level of a breach of the peace and committed in the presence of an officer who gave immediate and continuous pursuit. Absent these conditions, there appears to have been no such thing as an exigent circumstance

justifying a warrantless arrest for a misdemeanor.

The common law rule is sound, especially as it applies to warrantless nonconsensual entries into the home. It preserves the sanctity of the home by requiring that a neutral magistrate make the probable cause determination before a home entry.[13]

II. THE WISCONSIN SUPREME COURT INVITES EGREGIOUS VIOLATIONS OF THE PRIVACY OF THE HOME

The Wisconsin Supreme Court claimed support for its balancing of public and individual interests from language in

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[13]This rule guards against after-the-event hindsight justifications of warrantless entries. It also precludes the evidentiary problems inherent in determining what information was actually available to the officer. The record in this case reveals that it was fraught with such hindsight and evidentiary problems. The common law foreclosed such problems for misdemeanors.

Brown v. Texas, 443 U.S. 47, 50-51 (1979).

> "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

108 Wis. 2d at 328, 321 N.W. 2d at 250, J.A. 145. The citation is inapposite because the seizure evaluated in Brown was an investigatory stop, not an arrest or a home entry. Moreover, the invasion condemned in Brown, even after balancing was far less intrusive than that countenanced here by the Supreme Court of Wisconsin.

The Wisconsin Supreme Court also was troubled by the pervasive problem of drunken driving, citing statistics revealing the number of highway deaths. The Court did not explain why the drunken driving problem generally

was relevant to the problem of probable cause specifically. Presumably the Court meant that the public interest in catching culprits justifies a relaxed doctrine of probable cause where intoxication is suspected. This is flawed reasoning.

This Court rejected a similar justification for an equal protection violation. In Craig v. Boren, 429 U.S. 190 (1976), this Court held that despite statistical evidence that more males than females drove while drunk, it did not justify a gender-based discrimination against males which offended the Fourteenth Amendment.

This Court has recognized the seriousness of driving while intoxicated, and recently held that a state might constitutionally use as evidence the fact that a culprit has refused to take a breathalyzer test, South Dakota v.

Neville, ___ U.S. ___, 103 S.Ct. 916, 51 U.S.L.W. 4148 (Feb. 22, 1983). In Neville and in the cases upon which it relied, Schmerber v. California, 384 U.S. 757 (1966), the defendants were in lawful police custody when the alcohol blood tests were demanded. The Neville decision, moreover, notes that there might be due process problems if the "police initiated physical violence while administering the test. . . ." 103 S.Ct. at 921 n.9. Thus this Court in both Craig and Neville has recognized the principle that the Constitution places limits in the battle against suspected drunk drivers.

By its emphasis on the nature of the offense, the Wisconsin Supreme Court creates a "blood alcohol test" exception to the warrant requirement, much like the "murder scene" exception which the Court rejected in Mincey v.

Arizona, 437 U.S. 385 (1976).

The drunken driving problem, however serious, was not regarded as so serious by Wisconsin's legislature as to make a first offender guilty of anything other than a civil violation. Subsequent violations are only misdemeanors. The Wisconsin legislature did not direct nonconsensual home entries to test for intoxication.[14] It was the Wisconsin Supreme Court which did, thus diluting the importance of its own recent decision in Laasch v. State, 84 Wis. 2d 578, 267 N.W.2d 278 (1978), in which it recognized that because "one's

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[14]For a suggestion that legislation might authorize a home entry see State v. Boggess, 110 Wis. 2d 309, 328 N.W.2d 878 (Wis. Ct. App. 1982), upholding a warrantless, but peaceful home entry by the sheriff not to arrest but to investigate a serious report of child abuse. The Court relied upon 48.981 Wis. Stat. and the aid-to-life exception to the warrant requirement.

home is entitled to special dignity and sanctity" an invalid arrest deprives the courts of jurisdiction. 84 Wis. 2d at 594, 267 N.W.2d at 282.

The opinion of the Wisconsin Supreme Court, despite the flaws revealed in the dissenting opinion of Justice Abrahamson, creates an exception to the warrant requirement based upon alleged drunk driving.

III.A. THE WARRANTLESS NONCONSENSUAL NIGHTTIME ARREST IN THIS CASE CANNOT BE VALID UNDER THE EXIGENT CIRCUMSTANCES DOCTRINE.

Exceptions to the warrant requirement arise in two different situations. First, in criminal cases where the public policy favoring warrants must sometimes defer to the compelling need for immediate action by police. Such needs arise to protect against the loss of evidence in major criminal

cases or to protect the public from immediate hazards. Second, in civil cases where a governmentally approved scheme would indisputably fail if warrants were required.[15]

In Payton v. New York, 445 U.S. 573 (1980) this Court recognized that in some emergency situations, a doctrine of exigency excuses the warrant requirement.[16] In Payton, the Court

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[15]Donovan v. Dewey, 452 U.S. 594 (1981); Michigan v. Tyler, 436 U.S. 499, 510 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967) and cases cited at 387 U.S. at 539. Cf. Michigan v. Clifford, cert. granted #82-357, 51 U.S.L.W. 3545 (January 24, 1983). See also United States v. Kaiyo Maru No. 53, 699 F.2d 989, 995 (9th Cir. 1983), upholding a warrantless arrest of a foreign fishing vessel.

[16]Useful reviews of the doctrine are Groot, Arrests in Private Dwellings, 67 Va. L. Rev. 275 (1981); Donnino & Girese, "Exigent Circumstances for a Warrantless Home Arrest," 45 Albany L. Rev. 90 (1980); Harbaugh & Faust, "Knock on Any Door" - Home Arrests after Payton and Steagald, 86

expressly left open the question as to the type of emergency situation which would justify a warrantless nonconsensual entry into the home.

> Accordingly, we have no occasion to consider the sort of emergency or dangerous situation described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Id. at 583.

To find that police can make war-

Dickinson L. Rev. 191 (1982); Larkin, Exigent Circumstances for Warrantless Home Arrests," 23 Ariz. L. Rev. 1171 (1981); Note, Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem, 1978 U. Ill. L.F. 655; Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buffalo L. Rev. 419 (1972); Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St. L. J. 56 (1974); Note, The Neglected Fourth Amendment Problem in Arrest Entries, 23 Stan. L. Rev. 995 (1971). Note, Warrantless Arrests, Justification by Exigent Circumstances, 6 Hamline L. Rev. 191 (1983).

rantless nonconsensual entries into a home because of exigent circumstances requires two conclusions: 1) that the privacy interests of everyone in the home (not just the suspect's) are subordinate to the interests of government in law enforcement[17] and; 2) that the

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[17]Commentators urge that an arrest warrant based on a misdemeanor "may be constitutionally inadequate to authorize police entry into the suspect's home." Groot, Arrests in Private Dwellings, 67 Va. L. Rev. 275, 280 n.25 (1981); Evans, Constitutional Restraints on Residential Warrantless Arrest Entries, 10 Am. J. Crim. L. 1 (1982). An arrest warrant should not ordinarily authorize a forced entry into a home because the privacy interests of those sharing the suspects home are invaded. The 9th Circuit recently held that an arrest warrant alone did not justify entry into a home in a felony case, United States v. Underwood, 693 F.2d 1306 (9th Cir. 1982).

> "An arrest warrant does not involve a judicial determination that there is probable cause to believe that the suspect may be found within a specified private dwelling - a determination that would justify an otherwise prohibited entry."

693 F.2d at 1311. Contrary to

Fourth Amendment's reasonableness standard permits the invasion without neutral and detached magisterial evaluation. The State bears the burden of proving both conclusions.[18]

In the much cited case of Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc), the court suggested seven factors that should be considered before concluding that a home entry is exigent: (1) Whether or not a grave offense is involved; (2) whether the suspect is reasonably believed to be armed; (3) whether the evidence is clear that the suspect committed the crime; (4) whether there is a strong reason to believe the suspect is pre-

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Underwood is United States v. Spencer, 684 F.2d 220 (2nd Cir. 1982).

[18]McDonald v. United States, 335 U.S. 451, 456 (1948); Vale v. Louisiana, 399 U.S. 30 (1976).

sent in the home; (5) whether the suspect might escape; (6) whether the entry is made peaceably; and (7) whether the entry is made in daylight or at night.

The seven factor test is complex and it requires police to make "on the spot decisions by a complicated weighing and balancing of a multitude of imprecise factors." 2 LaFave, Search and Seizure §6.1 at 390.[19]

Another approach to evaluating whether an exigency exists is to apply a comprehensive definition, as exemplified in People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333 (1976), cert. denied, 429 U.S. 929 (1976). Exigency

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[19]The Dorman test is currently applied in the District of Colombia, United States v. Glover, 555 F. Supp. 604, 612 (D. D.C. 1982), and in Minnesota, State v. Hatcher, 322 N.W.2d 210 (Minn. 1982).

is defined as

> "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence."

545 P.2d at 1341. The Ramey definition has the merit of apparent simplicity and flexibility.[20]

Some Courts have avoided the categorical factor approach of Dorman and the definitional approach of Ramey and have adopted a case-by-case "holistic" test.[21] This is an open-ended test allowing courts to focus on whatever facts they wish to justify a warrant-

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[20]See discussion in Donnino and Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Albany L. Rev. 90 at 106-109 (1980).

[21]So described and cases cited in Donnino and Girese, supra at 109-110. See United States v. Flickinger 573 F.2d 1349 (9th Cir. 1978) cert. denied, 439 U.S. 836 (1978).

less entry. Nevertheless it includes evaluation of whether there was time to secure a warrant.

Professor LaFave suggests a presumption in favor of a warrantless entry and arrest in an ongoing investigation because "the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant. . . ." 2 LaFave, supra at 392. The Wisconsin Supreme Court adopted that presumption.[22]

The Wisconsin Supreme Court's presumption must be rejected because it would swallow the general rule against warrantless nonconsensual entries. The

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[22]108 Wis. 2d at 338, 321 N.W.2d at 255, J.A. 166-168 but see State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972).

Supreme Court of California cautions that

> "the exception must not be permitted to swallow the rule: in the absence of a showing of true necessity - that is imminent and substantial threat to life, health or property - the constitutionally guaranteed right to privacy must prevail."

People v. Smith, 7 Cal.3d 282, 286, 496 P.2d 1261, 1263 (1972).[23]

B. THERE CAN BE NO CIRCUMSTANCES JUSTIFYING ENTRY INTO THE HOME TO TAKE A BLOOD ALCOHOL TEST

The Wisconsin Supreme Court also justified Daley's entry because "without an immediate test, highly reliable

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[23]In accord: ALI, Model Code of Pre-Arraignment Procedure, § 260.5, Emergency Searches (1975):

> An officer who has reasonable cause to believe that premises . . . contain (1) individuals in imminent danger of death or seriously bodily harm . . . may, without a search warrant, enter and search . . . to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

and persuasive evidence . . . would be destroyed." 108 Wis. 2d at 338, 321 N.W.2d at 255, J.A. 166. That is not necessarily so for three reasons. First it is not certain a suspect will consent to a test. Second, even the Wisconsin Supreme Court recognized that the suspect may well continue to drink[24] "thereby rendering the result of a blood test meaningless" 108 Wis. 2d at 333, 321 N.W.2d at 253 (J.A. 155-6). Thus, the Wisconsin Supreme Court destroys a reason it advanced to justify entry. Third, there was ample time to secure a warrant.[25]

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[24]Welsh testified that he consumed about half a pint of Canadian Club after arriving home (J.A. 99).

[25]The concentration of alcohol in blood reaches its peak at some time after drinking ceases, perhaps as much as a half hour later. The rate at which alcohol is absorbed into the blood varies in each subject, depending

When Welsh was arrested, in April 1978, Wisconsin law allowed the results of a blood alcohol test for intoxication to be admitted as evidence without expert testimony if taken within two hours after the event to be proved. § 885.235(1) Wis. Stat. 1977 (A-6). After that two hour period, such a test could be admitted as evidence if "expert testimony establishes its probative value" 885.235(3).[26]

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on many factors, including: the nature of the drink, the amount and kind of food already in the stomach, the size, weight and condition of the subject, and his physiological and emotional condition at the time. Hence, complete absorption may require 2 to 6 hours or more. Goodman and Gilman's The Pharmacological Basis of Therapeutics 382 (6th ed. 1980).

[26]Wisconsin law now provides for admissibility within three hours without expert testimony, and after that time with expert testimony on the probative value of the test. Chapter 184, § 5, Laws of 1981, amending 885.235. On the same day as the Welsh decision

Further, a person can be detained for up to four hours. § 345.24 Wis. Stat. (A-2). Indeed the Supreme Court of Wisconsin observed:

> "Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level. . . ."

108 Wis. 2d at 327, 321 N.W.2d at 255 (J.A. 164)

The Supreme Court of Wisconsin relied upon the observation in State v. Bentley, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Wis. Ct. App. 1979), that an exigency is created because "blood

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the Wisconsin Supreme Court held admissable a blood test taken under the law applicable to Welsh over two hours after the event. State v. Peotter, 108 Wis. 2d 359, 321 N.W.2d 265 (1982), where the defendant did not adequately object to admission. The delayed test nevertheless had probative value.

rapidly metabolizes alcohol."[27] Yet in Bentley, the blood test was taken three and a half hours after an accident causing injuries and death to others! The Bentley court observed only that "the officers believed they did not have sufficient time to obtain a warrant from a magistrate." 92 Wis. 2d at 865, 286 N.W.2d at 155. What may be a reasonable belief on magisterial availability in Eau Claire where the Bentley case occurred is not necessarily true in Madison, Wisconsin's capital. Moreover, alcohol metabolizes at

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[27]The observation is false. Alcohol, absorbed from the stomach, is carried in the blood until it is metabolized in the liver and in other tissues, and it is not rapidly metabolized. See footnote 25 above and text.

Furthermore in Bentley as in Schmerber the defendants were in a hospital about to undergo medical treatment which might have destroyed the value of blood-alcohol tests.

the same rate in both cities.

The State has at no time offered any evidence that a warrant could not have been obtained in Madison, Wisconsin between the hours of 9:00 p.m. and midnight - within three and a half-hours after the suspected intoxication occurred, the period in which a valid blood test was obtained in the Bentley case.

C. THE ARREST OF WELSH WAS NOT TRIGGERED BY A DANGER TO HEALTH OR PUBLIC SAFETY

Edward Welsh, home in bed, threatened no one. Officer Daley's entry into the home was not to give first aid or assistance. The Wisconsin Supreme Court, however, without citing any evidence in the record, suggests that Welsh might return to his car and hence be a danger to himself and others. 108 Wis. 2d at 337, 321 N.W.2d at 255, J.A.

165).

Edward Welsh abandoned his car some distance from home where it was stuck. There is no evidence whatsoever that Edward Welsh would have gone back and started driving again. As Justice Abrahamson observed in dissent:

> "The contribution to highway safety of allowing warrantless arrests in the home of persons who are reported to have driven erratically and who are described as drunk or sick and who caused no damage to property or person is marginal at best."

108 Wis. 2d at 351-2; 321 N.W.2d at 261, J.A. 197-8. Indeed, it is ludicrous to drag a person from his bed to take him to a police station for a breathalyzer test and then by statute be compelled to hold him for 4 hours to protect the public.

Occasions may arise in which an interest in saving life should prevail over the interest in preserving the

sanctity of the home. This is not that occasion.[28]

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[28]Mincey v. Arizona, 437 U.S. 385, 392-3 (1978). People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607 (1976), cert. denied 426 U.S. 953 (1976). In State v. Kraimer, 99 Wis. 2d 306, 298 N.W.2d 568 (1980) the Wisconsin Supreme Court approved the emergency entry doctrine advanced in Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 Buff. L. Rev. 419, 426 (1973) stating

> "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search."

99 Wis. 2d at 306, 298 N.W.2d 572.

D. THE DOCTRINE OF "HOT PURSUIT" DOES NOT JUSTIFY A WARRANTLESS ENTRY

Without citation the Wisconsin Supreme Court relied on the "hot pursuit" doctrine. 108 Wis. 2d at 336, 321 N.W.2d at 254, J.A. 161. That court failed to explain the nature of the doctrine.

The roots of the doctrine are evidently justified by practicality. When an officer sees a fleeing felon, or one who has breached the peace in the officer's presence, it is rational to expect the officer to pursue, and perhaps even follow into the home where the escaping culprit takes refuge. Fundamental to the concept is a chase -- an immediate and uninterrupted pursuit of a felon, or at least of a major peace-breaker.[29]

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[29] Johnson v. United States, 333

Warden v. Hayden, 387 U.S. 294 (1967), which has been frequently referred to as a hot pursuit case (perhaps because of Mr. Justice Fortas' concurring opinion), was in reality not a hot pursuit case. An armed robbery was committed outside the presence of the police. It was a cab driver who saw the incident and pursued the suspect to a house. Police received the information and arrived at the house within five minutes. Upon their arrival at the house, the police knocked at the door and arguably were given per-

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U.S. 10, 16 n.7 (1948) appears to be the first place that the term "hot pursuit" was used by this Court. It is, however, a term used in international law to describe the right to pursue and capture foreign vessels on the high seas for prior offenses within territorial waters, see "The I'm Alone," (Canada v. United States), 2 Hackworth, International Law 703 (1941); The Newton Bay, 36 F.2d 729, 731 (2nd Cir. 1929, Manton J.).

mission to enter the house to search for the suspect.

This Court, in deciding that the entry without a warrant was valid, appears to have rested its decision upon all the factors which made immediate entry imperative.

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

387 U.S. at 298-99. Hence, the Court in Hayden rested its decision upon the exigency of the circumstances created by the gravity of the offense and the presence of firearms. This was recognized in United States v. Santana, 427 U.S. 38, 43 n.3 (1976) which is the

only true hot pursuit case decided by this Court.

In Santana, the Court recognized that some element of a chase will usually be involved in a "hot pursuit case." The defendant was first observed and sought for arrest by police in a public place where she had no expectation of privacy. Her retreat into the vestibule of her home did not prevent her lawful arrest because of the hot pursuit. The Court concluded,

> that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping to a private place.[30]

427 U.S. at 43.

This Court says that "hot pursuit" involves (1) the observance and at-

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[30]Citing United States v. Watson, 423 U.S. 411 (1976).

tempted arrest by the police of a suspected felon in a public place and (2) flight by that suspect followed by immediate and continuous pursuit of the suspect. The apprehension and arrest without a warrant may then occur in a private place.

No true hot pursuit exists in this case. Officer Daley was doubtless looking for Welsh, but Welsh was at home, not in a public place as in Santana. Nor was the suspect a felon, which would have made an attempted arrest of him in a public place valid under Watson.

A case closer to the present one is State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978), where the majority stated the facts to fit this Santana concept of hot pursuit. The strong dissent in that case, however, points out that the facts may have actually

been quite different from those stated by the majority and indicates the possible abuse by the police and courts of even this sort of "hot pursuit" definition.

E. EXIGENCIES RECOGNIZED BY LOWER COURTS ARE NOT REMOTELY CLOSE TO THE FACTS IN THE WELSH CASE.

Lower courts have found exigent circumstances in settings entirely different from this case. Warrantless entries have been allowed in felony cases where:

1) accomplices of a serious drug offender might suddenly appear to take away evidence;[31]

2) suspects might be warned and could escape, and where surveillance

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[31] United States v. Kulcsar, 586 F.2d 1283 (8th Cir. 1978); see also United States v. Mapp, 476 F.2d 67 (2nd Cir. 1973).

might have alerted the suspects;[32]

3) extrinsic evidence, such as drugs held by the suspects, could be quickly and easily destroyed;[33]

4) waiting while keeping the suspects place of hiding under surveillance would have been the equivalent of "laying a public siege;"[34]

5) a serious and reasonable belief that an ongoing national conspiracy to

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[32]United States v. Campbell, 581 F.2d 22 (2nd Cir. 1978); see also United States v. Williams, ___ F.2d ___ (6th Cir. 1982), pet. for cert. filed, #82-1442, 51 U.S.L.W. 3707.

[33]United States v. Vasquez, 638 F.2d 507 (2d Cir. 1980), cert. denied, 454 U.S. 975 (1981) (Brennan, J., White, J., Marshall, J., dissenting); United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978), cert. denied, 439 U.S. 836 (1978); State v. Nagel, 308 N.W.2d 539, 541-44 (N. 1981); State v. Decker, 119 Ariz. 195, 580 P.2d 333 (1978).

[34]United States v. Bustamante-Gamez, 488 F.3d 4, 9 (9th Cir. 1973).

assassinate public figures exists and should be thwarted.[35]

Edward Welsh's case does not fall within any of these.

IV. TELEPHONIC WARRANTS SUPPLY AN ALTERNATIVE TO A WARRANTLESS ENTRY

The Supreme Court of Wisconsin found that Officer Daley had probable cause to arrest Welsh for driving while intoxicated, that is a warrant could have been issued. Although the laws of Wisconsin do not specifically provide for warrants to be obtained by telephone, as do the Federal Rules of Criminal Procedure 41(c)(2), an old Wisconsin Supreme Court opinion suggests their propriety even without

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[35]See People v. Sirhan, 7 Cal.3d 369, 497 P.2d 1121 (1972).

specific legislation.[36] Counsel's investigations have not disclosed any decisions forbidding telephonic warrants in Wisconsin. Bills to specifically authorize search warrants to be issued following a telephone procedure were introduced in the Wisconsin legislature in 1982 and reintroduced in 1983.[37]

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[36]Glodowski v. State, 196 Wis. 265, 270-2, 220 N.W. 227, 229-30 (1928). Several states have approved such warrants, State v. Andries, 297 N.W.2d 124.125 (Minn. 1980); State v. Parisi, 177 N.J. Super. 451, 426 A.2d 1081 (1980), rev. on other grounds 436 A.2d 948 (N.J. Super. Ct. App. Div. 1981); State v. McMurphy, 48 Or. App. 327, 616 P.2d 1203, 1206 (Or. Ct. App. 1980). Telephone warrants are allowed by statute in Arizona and California. Ariz. Rev. Stat. Ann., sec. 13-3914(c) (1982); Cal. Pen. Code secs. 1526(b) and 1528(b) (West Supp. 1981).

[37]Wis. S. Bill 37 (1983) introduced Jan. 25, 1983. It is supported by the Attorney General of Wisconsin, The Wisconsin Chiefs of Police Association and by Wisconsin Sheriffs. Hear-

The 10th Circuit recently directed that when a trial court hears a claim that exigent circumstances justify a warrantless home entry, the availability of a telephonic warrant under Rule 41(c)2 should be considered. United States v. Cuaron, 32 Crim. L. Rep. 2493, March 16, 1983. This Court should confirm that wisdom and direct that the availability of a telephone warrant, or a normal arrest warrant, be considered when a nonconsensual home entry is sought.[38]

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ings on this bill were held on March 10, 1983.

[38]See Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A. L. Rev. 691 (1973).

V. A DECISION INVALIDATING THE ENTRY INTO THE WELSH HOME WOULD NOT HAMPER EFFECTIVE LAW ENFORCEMENT

Justices of this Court have frequently urged that it construct rules that foster rather than hinder effective law enforcement practices. United States v. Ross, 457 U.S. ___, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572, 594-5 (1982) (Blackmun, J., concurring); Payton v. New York, 445 U.S. 573, 618 (1980) (White, J. dissenting); United States v. Watson, 423 U.S. 411, 431 (1976) (Powell, J. concurring); Gerstein v. Pugh, 420 U.S. 103, 113 (1975).

A decision favoring Welsh could supply a useful "bright line" rule: namely, that police must never, without a warrant, enter a home to arrest a suspect whose only offense is minor. This would provide useful guidance to the police which they can understand.

CONCLUSION

The Welsh case is not a situation where entry was necessary to preserve evidence or life. Nor was it a situation where the suspect might escape.

This is a case in which a man, at night, naked in his bed in his family home, was arrested and forced to dress and leave the protection of his family. He was hustled to a police station for an offense which, so far as the police then knew, was punishable only by a forfeiture and the loss of driving privileges. Without consent the entry and arrest were unconscionable. This was an unreasonable seizure forbidden by the Fourth and Fourteenth Amendments to the Constitution.

This Court should reverse the Supreme Court of Wisconsin and remand for a determination of whether the of-

ficer's entrance was consensual.

Respectfully Submitted

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APPENDIX TO PETITIONER'S BRIEF

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WISCONSIN STATUTES 1975*

"345.20 Wis. Stat. 1975
General provisions in traffic

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*Some amendments to Wisconsin OMVWI Law in 1977 were effective immediately. Others were effective in 1978 after the events in the Welsh case.

forfeiture actions.
(1) Definitions. In ss. 345.20 to 345.53: (a) "Traffic regulation" means a provision of chs. 341 to 349 for which the penalty for violation is a forfeiture, or an ordinance enacted in accordance with s. 349.06."

"345.22 Wis. Stat. 1975 Authority to arrest without a warrant. A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.

345.24 Wis. Stat. 1975 Officer's action after arrest for driving under influence of intoxicant. A person arrested under s. 346.63 or an ordinance lawfully enacted in conformity therewith for operating a motor vehicle while under the influence of an intoxicant may not be released until 4 hours have elapsed from the time of his arrest or unless a chemical test administered under s. 343.305 shows that there is .05% or less by weight of alcohol in such person's blood, but such person may be released to his attorney, spouse, relative or other responsible adult at any time after arrest.

"346.63 Wis. Stat. 1975 Operating under influence of

intoxicant. (1) It is unlawful for any of the following to drive or operate a motor vehicle (a) a Person who is under the influence of an intoxicant or a controlled substance."

WISCONSIN STATUTES 1975

"346.65 Wis. Stat. 1975 Penalty for violating sections 346.62 to 346.64. . . . .(2) Any person violating s. 346.63 (1) may be required to forfeit not more than $200 for the first offense and, upon the 2nd or subsequent conviction within 5 years, shall be imprisoned not less than 5 days nor more than one year and in addition may be fined not more than $500."

"343.305 Wis. Stat. Suspension of license on refusal to submit to chemical tests for intoxication. (1) Any person who drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61 shall be deemed to have given consent to a chemical test of his breath, blood or urine, for the purpose of determining the alcoholic content of his blood if arrested and issued a citation for driving or operating a motor vehicle while under the influence of an intoxicant in violation of s. 346.63 (1) (a) or a local ordinance which is in conformity there-

with. The test shall be administered upon the request of a traffic officer.

* * *

(2) (a) If a person is arrested and issued a citation for driving or operating a motor vehicle while under the influence of an intoxicant the arresting officer shall inform him:

1. That he is deemed to have consented to a chemical test under sub. (1);

2. That if he refuses to submit to the test he shall have his driving privilege suspended for a period of 60 days as provided in sub. (7);

* * *

2. (b) If the person refuses the request of a traffic officer to submit to a chemical test, no test shall be given, but the traffic officer shall prepare a written report of the refusal and have it delivered within 5 days to a court of record in the county in which the person resides or in the county in which the arrest was made. He shall promptly deliver a copy to the person requested to take such test. The report shall contain the following information:

1. That the person at the time he was requested to submit to a test was under arrest for driving or operating a motor vehicle while under the influence of an intoxicant.

2. That the person refused to submit to a test;

3. That such person was in-

formed of the consequences of his refusal to submit to the test; and

4. That such person was informed of his rights under subs. (4) and (5)(a).

5. That the refusal of the person to submit to a test was unreasonable."

* * *

(7) (c) If the reported person requests a hearing within the 60 days, the court shall set a time and place for the hearing, with notice to the person. Requests for hearing as herein provided shall go to the head of the docket wherein filed. The hearing shall be transcribed and shall be limited to the issues stated in sub. (2) (b). Nothing in this subsection shall prohibit the person from introducing evidence on his own behalf to establish the reasonableness of his refusal to submit to a chemical test provided under s. 343.305(1). At the close of the hearing or within 10 days thereafter, the court shall determine whether or not the conditions of sub. (2) (b) have been complied with. If the conditions of sub. (2) (b) have been complied with, the court shall direct the administrator to suspend the operating privilege of such person for 60 days. If the conditions of sub. (2) (b) have not been complied with, the court shall order that the report be dismissed and that no action be taken on the driving privilege.

Nothing in this subsection shall preclude the prosecution for violation of s. 346.63 (1) (a) or a local ordinance which is in conformity therewith."

WISCONSIN STATUTES 1977

885.235 Chemical tests for intoxication. (1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant when operating or driving a motor vehicle, or while handling a firearm, evidence of the amount of alcohol in such person's blood at the time in question as shown by chemical analysis of a sample of his breath, blood or urine is admissible on the issue of whether he was under the influence of an intoxicant if such sample was taken within 2 hours after the event to be proved.

* * *

(3) If the sample of breath, blood or urine was not taken within 2 hours after the event to be proved, evidence of the amount of alcohol in the person's blood as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if such effect is established by expert testimony.

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Case No. 82-5466

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

EDWARD G. WELSH,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT

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2 La Fave, *Search & Seizure*,
sec. 5.1 (1978) 24

Case No. 82-5466

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

EDWARD G. WELSH,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited in the Brief of Petitioner, the following provisions are cited in the Brief of Respondent:

United States Constitution:

> Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 939.12, Wis. Stats. (1975):

> **Crime defined.** A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

Section 968.07, Wis. Stats. (1975):

Arrest by a law enforcement officer. (1) A law enforcement officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or

(c) He believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

(2) A law enforcement officer making a lawful arrest may command the aid of any person, and such person shall have the same power as that of the law enforcement officer.

Section 346.65(2), Wis. Stats. (1981):

Penalty for violating sections 346.62 to 346.64.

....

(2) Any person violating s. 346.63(1):

(a) Shall forfeit not less than $150 nor more than $300, except as provided in par. (b) or (c).

(b) Shall be fined not less than $300 nor more than $1,000 and imprisoned not less than 5 days nor more than 6 months if the total of revocations under s. 343.305 and convictions

under s. 346.63 (1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, equals 2 in a 5-year period, except that revocations or convictions arising out of the same incident or occurrence shall be counted as one. The 5-year period shall be measured from the dates of the refusals or violations which resulted in the revocation or convictions.

(c) Shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total of revocations under s. 343.305 and convictions under s. 346.63 (1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, equals 3 or more in a 5-year period, except that revocations or convictions arising out of the same incident or occurrence shall be counted as one. The 5-year period shall be measured from the dates of the refusals or violations which resulted in the revocation or convictions.

Section 940.19(1), Wis. Stats. (1981):

Battery; aggravated battery. (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

Section 939.60, Wis. Stats. (1981):

Felony and misdemeanor defined. A crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor.

SUPPLEMENTAL STATEMENT OF FACTS

The respondent, State of Wisconsin (hereinafter "the state"), provides the following facts to supplement those stated in the Brief of Petitioner and to correct a statement in regard to the facts made in the *amicus curiae* brief filed for the Wisconsin Civil Liberties Union Foundation.

Randy Jablonic saw Edward G. Welsh (hereinafter "the defendant") driving his car extremely cautiously, first traveling very, very slowly and then a little faster (R. 13:8).[1]/ Jablonic saw the car go from side to side on the road; and as the car approached a boulevard it headed for the median where there was a sign telling drivers to stay to the right (R. 13:8-9). Jablonic said the car was not traveling at an excessive rate of speed, but it was weaving back and forth (R. 13:9). Jablonic saw the defendant's eastbound car go down the left lane (R. 13:9). When a car approached from the east, the defendant's car veered left at the last moment before a head-on collision occurred and drove into a cemetery, or open field, where the car stalled or got stuck. (R. 13:9).

Jablonic drove past the defendant's car, turned around and pulled up behind the car to keep it from returning to the road (R. 13:10). Jablonic explained:

> I made a u-turn there and pulled up behind because I didn't want that car to come back out on the road. Because I realized they would probably kill somebody. And I immediately stopped the lady or the person who had been forced to stop by this car, and asked them to go call the police — to get some help so that we

[1]/ The record reference is to page 8 in the transcript of the hearing of July 14, 1980, which has been numbered document 13 in the record. Later in this brief there is a reference to a transcript of another portion of the July 14, 1980, hearing and that transcript is numbered document 14 in the record.

> could prevent this person from getting back out on the road.

(R. 13:10)

As reported in the Brief of Petitioner, while Jablonic was stopped the defendant approached Jablonic's truck. The defendant asked Jablonic for a ride home and Jablonic said that they had better wait to get some help to get the car out (R. 13:12). Jablonic testified:

> And then the person broke into a very slurred conversation — "you wouldn't get your cops" —or something — it was very insecure and not very controlled conversation. I was very — they were very much concerned that I would call the cops, and they were accusing that I was going to call the cops. I said, "Well, I have sent the lady to get help."

(R. 13:12)

Jablonic said that the defendant again asked for a ride home, and when Jablonic refused the defendant walked away (R. 13:12).

At page 27 of the *amicus curiae* brief filed for the Wisconsin Civil Liberties Union Foundation there is a statement that the police "barged right in" the Welsh home. There is nothing in the record to support the claim that the police barged into the Welsh home. As indicated at pages 10 and 11 of the Brief of Petitioner, the police thought they had received consent to enter the home but Mrs. Welsh denied that she had given consent. The judge made no findings on whether the entry was consensual; but not even Mrs. Welsh's testimony supports a claim that the police "barged right in" the home.

SUMMARY OF ARGUMENT

The police made a warrantless arrest of the defendant in his home for the offense of operating a motor vehicle while under the influence of an intoxicant. The defendant was charged with the misdemeanor offense of operating while under the influence (R. 3:1; J.A. 4-5).

The state understands the defendant's argument to be that his arrest was invalid for two reasons: first, he was arrested for a forfeiture offense and the police can never make a warrantless arrest of an accused in his home for a forfeiture offense; and, second, even if a warrantless arrest in the home could be made on the basis of probable cause and exigent circumstances, no exigent circumstances existed in this case.

In responding to the defendant's arguments, the state contends, first, that this case should be treated as an arrest for a misdemeanor rather than for a forfeiture offense since under the state law the defendant had to be charged with the misdemeanor offense because he had a prior conviction for drunk driving.[2]/ Second, whether the arrest was for an offense labeled either a forfeiture or a misdemeanor by the Wisconsin Legislature, the police had the authority to make the warrantless entry and the arrest was constitutionally valid as long as the police possessed probable cause and there were exigent circumstances justifying their failure to obtain a warrant. This is the same test applied by this Court in *Steagald v. United States*, 451 U.S. 204, 211-12 (1981), and *Payton v. New York*, 445 U.S. 573, 590, 603 (1980). Third, the probable cause prong has been satisfied in this case and the defendant has not challenged the fact that the police possessed probable cause. Fourth, exigent circumstances

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[2]/ Whether the difference between an arrest for a forfeiture offense and an arrest for a misdemeanor offense is significant will depend upon how this Court decides the question of the police officer's authority to arrest, a question the state discusses in section II of this brief.

existed, *i.e.*, the police needed to make an immediate arrest in order to prevent the imminent destruction of evidence because if time had been taken to obtain a warrant the alcohol level in the defendant's blood would have diminished before tests could be made.

On the basis of these arguments, the state concludes that, because the police possessed probable cause and exigent circumstances existed, the warrantless arrest of the defendant in his home was constitutionally valid.

ARGUMENT

I. The Defendant Was Arrested For The Misdemeanor Offense Of Operating A Motor Vehicle While Under The Influence Of An Intoxicant.

The defendant was arrested in his home on April 24, 1978, for operating a motor vehicle while under the influence of an intoxicant (R. 13:27, 38; J.A. 29, 46).

In April, 1978, a person convicted of drunk driving for the first time could be required to forfeit not more than $200. Sec. 346.65(2), Wis. Stats. (1975). For each subsequent conviction for violating the drunk driving statute within five years, the person "shall be imprisoned not less than five days nor more than one year and in addition may be fined not more than $500." Sec. 346.65(2), Wis. Stats. (1975). Thus, under Wisconsin's definition of a crime, conviction for the first offense of drunk driving was not criminal since it was punishable only by a forfeiture; but each subsequent conviction within five years was a crime because it was punishable by a fine or imprisonment or both. *See* sec. 939.12, Wis. Stats. (1975) (crime is an offense punishable by fine, imprisonment or both).

The defendant has contended that he was arrested for the first offense of drunk driving, *i.e.*, a forfeiture offense, because there was no evidence that at the time of the arrest the police knew that within the previous five years he had been convicted of drunk driving.

The defendant has stated that the question presented in this case is whether the police can, without a warrant and without consent, enter a suspect's home at night to arrest him for a nonjailable traffic offense committed outside the presence of the police (Brief of Petitioner at 2-3).

The state submits that the defendant is incorrect in concluding that the arrest was made for a nonjailable traffic offense. The state contends that, for the following reasons, the arrest was made for a misdemeanor offense for which the defendant, if convicted, would be required to spend a minimum of five days in jail and for which he could be sentenced to spend up to one year in jail.

The defendant was charged with the misdemeanor offense of drunk driving (R. 3:1; J.A. 4-5), thereby indicating that he had a prior conviction within five years. Because the defendant had the prior conviction, he had to be charged with the misdemeanor offense of drunk driving; the prosecutor and the trial court had no choice. In *State v. Banks*, 105 Wis. 2d 32, 39, 40, 313 N.W.2d 67, 70 (1981), the Wisconsin Supreme Court considered a later version of sec. 346.65, Wis. Stats., which states the penalty for drunk driving; and the court concluded that, because the statute used the word "shall" in regard to the punishment for subsequent offenses, the legislature intended that criminal proceedings and penalties are required for a second offense drunk driving charge within a given five-year period. Under the rationale of *Banks*, the use of the word shall in sec. 346.65(2), Wis. Stats. (1975), which was in effect on the date of the defendant's arrest, required that the defendant be charged

with the criminal offense of drunk driving because he had a prior conviction within five years.

In *Banks*, the Wisconsin Supreme Court pointed out that the trial court had no discretion to treat the second offense as anything but a misdemeanor. 105 Wis. 2d at 42, 43, 313 N.W.2d at 71, 72. In *County of Walworth v. Rohner*, 108 Wis. 2d 713, 717, 324 N.W.2d 682, 684 (1982), the Wisconsin Supreme Court said that even though the first drunk driving offense may be charged civilly, "'subsequent offenses *must be charged as crimes.*'" (Emphasis added in *Rohner*.) The court considered a version of sec. 346.65, Wis. Stats., that differed from the 1975 version applicable to the defendant; but because the court's conclusion was based on the legislature's use of the word "shall" (*Rohner*, 108 Wis. 2d at 717, 324 N.W.2d at 683), the court's reasoning and conclusion apply to the 1975 statute that also used the word shall to require imprisonment for the second or subsequent offenses within five years. This means that, because the defendant in the instant case had a prior drunk driving conviction, he had to be charged with the misdemeanor offense of drunk driving. When the police officers arrested the defendant for drunk driving, the arrest was for the misdemeanor offense of drunk driving whether or not the police knew of the prior conviction.

The police had probable cause to arrest the defendant for the misdemeanor offense of drunk driving even if they did not know of the prior conviction. The two elements of the offense of operating while under the influence of an intoxicant are (1) driving or operating a motor vehicle and (2) doing so while under the influence of an intoxicant. *State v. McAllister*, 107 Wis. 2d 532, 535, 319 N.W.2d 865, 867 (1982), and *State v. Burkman*, 96 Wis. 2d 630, 644, 292 N.W.2d 641, 647-48 (1980). Those two elements constitute the conduct prohibited by the drunk driving statute, which was sec. 346.63(1), Wis. Stats. (1975). Those are the only facts the police must know about the

accused in order to have probable cause to believe that the accused violated the drunk driving statute.

The penalty for violating sec. 346.63(1), Wis. Stats. (1975), was specified in a different statute, sec. 346.65, Wis. Stats. (1975), which provided that the first offense carried a forfeiture penalty and that subsequent offenses within five years must be penalized by imprisonment and possibly a fine. The graduated penalty structure in sec. 346.65, Wis. Stats., "is nothing more than a penalty enhancer similar to the repeater statute which does not in any way alter the nature of the substantive offense, *i.e.*, the prohibited conduct, but rather goes only to the question of punishment." *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867.

Therefore, when the police had probable cause to believe that the defendant had operated a motor vehicle while under the influence of an intoxicant, the police had probable cause to believe that the defendant had committed a crime in violation of sec. 346.63(1), Wis. Stats. (1975). Because the defendant had the prior conviction his conduct constituted the crime whether or not the police knew of the prior conviction.

The instant case is similar to *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976). In that case, the officers thought they had a valid warrant to arrest the accused for a misdemeanor. The court held the warrant invalid but ruled that the arrest was still valid simply because the facts known by the police constituted probable cause to believe that the accused had committed a felony. Thus, in *LaBelle*, the arrest was valid because the facts known by the police constituted a felony. It made no difference to the validity of the arrest that the police did not realize they had knowledge of a felony; in fact, they believed the arrest was for a misdemeanor.

In the instant case, then, the defendant was arrested for the misdemeanor offense of drunk driving. Whether the police knew of the defendant's prior conviction is irrelevant to the question of the validity of the arrest. As the state will argue in the next section of this brief, the arrest was valid whether the defendant was arrested for a forfeiture offense or for a misdemeanor. But if it makes a difference whether the defendant was arrested for a forfeiture or a misdemeanor, for the reasons discussed above, this Court must treat the arrest as being for a misdemeanor. Because of the defendant's prior conviction, he had to be charged with the misdemeanor offense; and the penalty had nothing to do with the elements of the offense, as the Wisconsin Supreme Court ruled in *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867.

In its opinion in this case, the Wisconsin Supreme Court treated the arrest of the defendant as being for the forfeiture offense. In doing so, the court apparently acted on a belief that knowledge of the defendant's prior conviction was relevant to probable cause. However, this was erroneous since the penalty provision is not pertinent to the elements of the offense, as the supreme court said in *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867. *See also Banks*, 105 Wis. 2d at 42, 313 N.W.2d at 71.[3]/ This Court is not required to accept the Wisconsin Supreme Court's erroneous belief that the arrest was for a forfeiture. This Court can independently evaluate the facts and circumstances known to the police officer; and if those facts show probable cause for a misdemeanor, then this Court should treat the arrest as being for a misdemeanor. *See United States v. Bonds*, 422 F.2d 660, 664 (8th Cir. 1970).

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[3]/ In the instant case, the state was not able to rely on the *McAllister* opinion for support in the state courts because the *McAllister* case was decided after the *Welsh* case was briefed and argued. *See* the dates listed on the title pages of the opinions in *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982), and *McAllister*, 107 Wis. 2d at 532, 319 N.W.2d at 865.

In summary, because the defendant had a prior conviction within five years, he had to be charged with the misdemeanor offense of drunk driving for his arrest on April 24, 1978. As will be noted later in this brief, the police had probable cause to believe that the defendant had violated the drunk driving statute. Therefore, when the police arrested the defendant, the arrest was for a misdemeanor offense even if the police did not know of the prior conviction.

II. Whether The Defendant Was Arrested For A Misdemeanor Or A Forfeiture Offense, The Arrest Was Valid If The Police Had Probable Cause To Believe He Committed The Offense Of Drunk Driving And Exigent Circumstances Existed To Justify Their Failure To Obtain A Warrant.

In *Payton*, this Court ruled that in the absence of consent or exigent circumstances a warrant is needed to enter the residence of an accused to arrest him. 455 U.S. at 590, 603. *See also Steagald*, 451 U.S. 211-12.

Payton involved a warrantless entry to make a felony arrest; but the state contends that the same rules apply for arrests for all offenses, whether they are labeled felony, misdemeanor or forfeiture, as long as the offense could be classified as a crime within the limits of the Eighth Amendment of the United States Constitution. This rule will result in a uniform application of the constitution in all the states.

Applying the *Payton* test to the instant case, the Wisconsin Supreme Court held that the arrest of the defendant in his home was valid because the police possessed information that gave them probable cause to believe that the defendant was guilty of drunk driving,

and exigent circumstances existed because absent an immediate arrest evidence would be destroyed by the dissipation of the alcohol in the defendant's blood.

The defendant contends that without a warrant the police cannot constitutionally arrest an accused person in his home for a misdemeanor crime or a forfeiture offense because the common law rules of arrest were made part of the United States Constitution by the adoption of the fourth amendment; and under the common law a police officer could not make a warrantless arrest for a misdemeanor, even in a public place, unless the misdemeanor was committed in his presence. The defendant contends that because he did not commit the offense of drunk driving in the presence of an officer, he could not constitutionally be arrested even for the misdemeanor offense of drunk driving and even in a public place. Therefore, he concludes that without a warrant the police could not constitutionally arrest him in his home for the forfeiture offense of drunk driving.

As argued above, the state contends the defendant was arrested for the misdemeanor offense of drunk driving. Nevertheless, whether the arrest was for the first offense of drunk driving (a forfeiture offense) or a subsequent offense of drunk driving (a misdemeanor offense) is not important for purposes of determining the constitutionality of the arrest. In either event, the arrest was valid. The reasons for the validity of the arrest can be summarized as follows:

First, the common law distinction between arrests for misdemeanors and arrests for felonies was not adopted by the fourth amendment. Thus, the constitutional limits on the rules for arrest are the same for all crimes and the states are free to enact laws giving the police the same powers to arrest for forfeiture offenses and misdemeanors as for felonies. If the fourth amendment permits arrests only for crimes, the word "crime" should be defined in

terms of the eighth amendment, *i.e.*, any conduct that could be prohibited as a crime within the limits of the eighth amendment should be considered a crime for purposes of fourth amendment rules of arrest and search and seizure. This will insure uniform constitutional rights throughout the country. Because drunk driving can be classified as a crime within the limits of the eighth amendment; and because the constitutional rules for arrest are the same for all crimes; the constitutionality of the arrest of the defendant is tested by the standards adopted in *Payton*. Under those standards, the defendant's arrest was valid because the police possessed probable cause and exigent circumstances existed.

Second, in the alternative, if this Court concludes that the constitution preserved the common law distinction between misdemeanor arrests and felony arrests, for purposes of constitutional rules, the distinction still should be made in terms of the eighth amendment. In other words, for purposes of fourth amendment rules of arrest, a felony would be any offense that could be classified a felony under the eighth amendment. In the instant case, because drunk driving can be classified a felony under the eighth amendment, the rules of felony arrest would apply to the defendant's arrest regardless of whether the offense was labeled forfeiture or misdemeanor by the Wisconsin Legislature. Under the rules applicable to felony arrests, the arrest of the defendant in his home was valid because the police possessed probable cause and exigent circumstances existed.

Under either theory, it is important to use the eighth amendment to define the level of the offense for purposes of the fourth amendment rules of arrest so that application of the fourth amendment is consistent throughout the country. Constitutional rights should not be determined by the label a particular state affixes to prohibited conduct.

Third, if this Court concludes that the constitution preserved the common law distinctions between misdemeanor arrests and felony arrests and that the local legislature's label of felony or misdemeanor is controlling, the arrest of the defendant is valid because all warrant requirements have allowed exceptions to the rule. The state admits that usually a warrant is needed to enter a home to arrest the accused. However, typically warrants are not required where exigent circumstances exist. In this case, the exigent circumstances exception applies whether the arrest was for a misdemeanor or a forfeiture.

A. *The common law rules of arrest were not made part of the constitution by the adoption of the fourth amendment.*

The defendant argues that *Payton* and *United States v. Watson*, 423 U.S. 411 (1976), "recognized that the common law rules of arrest had been carried into the fourth amendment guarantees against unreasonable searches and seizures, *i.e.*, a warrantless arrest not permitted by the common law was constitutionally unreasonable." (Brief of Petitioner at 32.)

The state submits that the defendant is incorrect because the state does not believe that the common law rules of arrest were made part of the constitution by the adoption of the fourth amendment; at least the common law distinctions between felony arrests and misdemeanor arrests were not made part of the constitution.

The common law distinguished between felonies and misdemeanors by allowing officers to make warrantless arrests for felonies in public places on the basis of probable cause even if the felony was not committed in the officer's presence; however, in the case of a misdemeanor, the officer could make a warrantless arrest in a public place only if the offense was committed in the presence of the officer. *Watson*, 423 U.S. at 418, 419.

In *Watson*, this Court held that it was constitutional for the police to arrest a person in a public place if the police officer simply had probable cause to believe that the accused had committed a crime. 423 U.S. at 415, 423-24. The crime involved in *Watson* was a felony. 423 U.S. at 413 n.2, 415.

Justice Marshall dissented in *Watson* because he believed that, unless exigent circumstances existed, a warrant should be required to arrest a person in a public place. 423 U.S. at 435, 451. Justice Marshall believed that the majority of the Court in *Watson* eliminated the common law rules of arrest:

> Second, by paying no attention whatever to the substance of the offense, and considering only whether it is labeled "felony," the Court, in the guise of "constitutionalizing" the common-law rule, actually does away with it altogether, replacing it with the rule that the police may, consistent with the Constitution, arrest on probable cause anyone who they believe has committed any sort of crime at all. Certainly this rule would follow if the legislatures re-denominated all crimes as "felonies." As a matter of substance, it would seem to follow in any event from the holding of this case, for the Court surely does not intend to accord constitutional status to a distinction that can be readily changed by legislative fiat.

423 U.S. at 545-55 (footnote omitted).

If Justice Marshall is correct, the constitution makes no distinction between a misdemeanor and a felony in regard to the authority of the police to arrest in a public place. Because each is a crime, the arrest for either a misdemeanor or a felony can be made in a public place as long as the officer has probable cause. It makes sense to treat all crimes the same under the constitution. If the

constitution treated the officer's arrest authority differently depending on whether the crime was a felony or a misdemeanor, the state legislatures could effectively alter the accused's constitutional rights simply by changing the label attached to the crime or by redefining what they choose to call a felony. *See, e.g.*, sec. 939.60, Wis. Stats. (1981), which defines felony as a crime punished by imprisonment in the Wisconsin state prisons.

Justice Marshall must be correct in concluding that the constitution makes no distinction between police authority to make a misdemeanor arrest and the authority to make a felony arrest because, if the constitution made the distinction, it would sanction the paradox whereby states could indirectly grant the police greater arrest authority simply by classifying all crimes as felonies, but they could not directly grant the police greater authority by passing a law saying that the arrest authority for misdemeanors was the same as for felonies. Such a situation is avoided if the fourth amendment treats all offenses alike and permits the states to establish the arrest authority either directly or indirectly, as they choose. Wisconsin chose to take the direct route by authorizing the police to make arrests in traffic cases and misdemeanor cases on the basis of probable cause, the same standard applied in felony cases. *See* sec. 345.22, Wis. Stats. (1975), and sec. 968.07, Wis. Stats. (1975).

In *Payton*, this Court ruled in the context of a felony case that in the absence of consent or exigent circumstances the police need an arrest warrant to enter the accused's home to arrest him. 455 U.S. at 590, 603. *See also Steagald*, 451 U.S. at 211-12. *Payton* has been interpreted to permit a warrantless home entry to arrest the accused if police have probable cause and if exigent circumstances exist. *Welsh*, 108 Wis. 2d at 327, 321 N.W.2d at 250.

The state submits that, as in a public place where the constitutional rule of arrest is the same for a misdemeanor

as for a felony, see *Watson*, 423 U.S. at 454-55 (Marshall, J., dissenting), the constitutional rule for arrest in an accused's home should be the same for a misdemeanor as for a felony. In the case of either type of crime, a warrantless arrest should be valid as long as the police possess probable cause and exigent circumstances exist.

If the constitution required standards for the arrest of a misdemeanor different from the standards applied to the arrest for a felony, an accused's constitutional rights would change from state to state depending upon the label the various state legislatures placed on the offense. As applied to the instant case, the constitutional rules for entry of an accused's home would differ in Indiana, New York, Oklahoma and Texas where second offense drunk driving is a felony[4]/ from Wisconsin where the second offense drunk driving is a misdemeanor.[5]/

To ensure a uniform constitutional rule of arrest, the fourth amendment should treat all crimes the same. Whether crimes are classified as felonies or misdemeanors is largely a state matter, *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972); and legislative bodies may exercise a relatively wide discretion in classifying particular offenses as felonies or misdemeanors, *United States v. Watson*, 423 U.S. at 439 n.6 (Marshall, J., dissenting), quoting *Carroll v. United States*, 267 U.S. 132, 158 (1925). However, the legislative bodies do not have unlimited discretion in classifying offenses as misdemeanors or felonies. The eighth amendment imposes limits on what can be made criminal and punished as such as well as setting limits on what offenses can be classified and punished as felonies. *Rummel v. Estelle*, 445 U.S. 263, 269, 284 (1980).

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[4]/ Ind. Code Ann. § 9-4-1-54 (Burns Supp. 1982); N.Y. Veh. & Traf. Law § 1192 (McKinney Supp. 1982-83); Okla. Stat. Ann. tit. 47, § 11-902 (West Supp. 1982-83); Tex. Veh. Code Ann. § 6701 L-2 (Vernon Supp. 1982-83).

[5]/ Section 346.65(2), Wis. Stats. (1975), and sec. 346.65(2), Wis. Stats. (1981).

For the sake of uniformity under the constitution, the fourth amendment should view all crimes the same for purposes of search and seizure and arrest. In addition, any offense, whether a violation of federal or state or local laws, should be considered a crime for purposes of the fourth amendment if the offense could be classified as a crime within the limits of the eighth amendment. Under this approach, all the constitutional limits governing arrest and search and seizure will be contained within the four corners of the constitution where they cannot be altered by statutory changes. The limits will be set by the fourth and eighth amendments. Although states could still set tighter limits on the police officer's authority to arrest, the tighter limits would be based on state laws and constitutions; the different limits would not be a result of states altering federal constitutional rights through the labeling of offenses.

Under this approach, individuals do not lose any constitutional right that they already have. States have always been able to make any offense a crime and any crime a felony as long as the eighth amendment has been satisfied. After an offense has been classified a felony, the police have been able to enter the accused's home to make a warrantless arrest as long as the police had probable cause and exigent circumstances.

Under the approach suggested by the state in this brief, the constitution will recognize uniform police arrest authority regardless of the label the legislature attaches to the offense. The constitutional limits on the police officer's arrest authority will be based solely on the limits contained in the constitution and will not be based in part on the vagaries of state legislatures.

Under this approach, the police could enter the defendant's home if they had probable cause and exigent circumstances. This is so because under the eighth amendment drunk driving can be classified as a crime.

Indeed, most states classify drunk driving as at least a misdemeanor.[6]/ Several states classify second or subsequent offenses of drunk driving as felonies.[7]/

The approach to arrest and search and seizure problems suggested by the state provides a system of uniform rights under the constitution. Under this analysis, a person's constitutional rights do not change depending upon the label a state legislature places on an offense.

If the common law rules of arrest were not made part of the constitution, the various states by statute and state constitution can set different limits on the arrest authority of the police; but the United States constitutional limits and rights will not thereby be changed. Under the common law, the police officer did not have authority to arrest for a misdemeanor not committed in his presence. The states by statute or by state constitution should have

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[6]/ In the following states and the District of Columbia, the first conviction for drunk driving is punished as a misdemeanor:

Ala. Code § 32-5A-191 (Supp. 1982)
Alaska Stat. § 28-35-030 (Supp. 1982)
Ariz. Rev. Stat. Ann. § 28-692 (Supp. 1982-1983)
Ark. Stat. Ann. § 75-1027 (1979)
Cal. Veh. Code § 23152 (Deering Supp. 1983)
Conn. Gen. Stat. § 14-227(a) (1983)
Del. Code Ann. tit. 21, § 4177 (Supp. 1983)
Fla. Stat. Ann. § 316.193 (West Supp. 1983)
Ga. Code Ann. § 68A-902 (Supp. 1982)

(footnote continued)

[7]/ Drunk driving is classified a felony in the following states: Ind. Code Ann. § 9-4-1-54 (Burns Supp. 1982), second offense; Iowa Code Ann. § 321.281 (West Supp. 1982-1983), third and subsequent offenses; Mich. Comp. Laws Ann. § 257.625 (Supp. 1982-1983), third offense within ten years; Mo. Ann. Stat. § 577.023 (Supp. 1983), third offense within three years; N.Y. Veh. & Traf. Law § 1192 (McKinney Supp. (182-1983), second offense within ten years; Okla. Stat. Ann. tit. 47, § 11-902 (West Supp. 1982-1983), second offense; S.D. Codified Laws Ann. § 32-23-4 (1976), third and subsequent offenses; and Tex. Veh. Code Ann. § 6701L-2 (Vernon Supp. 1982-1983), second offense.

the power to alter the common law arrest authority of police officers. Typically, the common law can be changed by statute or state constitution. *See Silver v. Silver*, 280 U.S. 117, 122 (1929), and *Noble State Bank v. Haskell*, 219 U.S. 104, 113 (1911). The common law rule of arrest should not be an exception. In *Payton*, this Court pointed out that the common law rule of arrest developed in legal contexts that substantially differ from the cases arising today. 445 U.S. at 591. In *Steagald*, this Court said in 451 U.S. at 217 n.10:

> The significance accorded to such authority [referring to the common law as being instructive by determining what sort of searches and seizures the framers of the fourth amendment regarded as reasonable], however, must be kept in perspective, for our decisions in this area have not "simply frozen into constitutional law

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Hawaii Rev. Stat. § 291-4 (Supp. 1982)
Idaho Code § 49-1102 (1980)
Ill. Ann. Stat. ch. 95 1/2, § 11-501 (Smith-Hurd Supp. 1982-1983)
Ind. Code Ann. § 9-4-1-54 (Burns Supp. 1982)
Iowa Code Ann. § 321.281 (West Supp. 1982-1983)
Kan. Stat. Ann. § 8-1567 (1982)
La. Rev. Stat. Ann. § 14.98 (West Supp. 1983)
Me. Rev. Stat. Ann. tit. 29, § 1312B (Supp. 1982-1983)
Md. Transp. Code Ann. § 21-902 (Supp. 1982)
Mich. Comp. Laws Ann. § 257.625 (Supp. 1982-1983)
Minn. Stat. Ann. § 169.121 (West Supp. 1983)
Miss. Code Ann. § 63-11-30 (Supp. 1982)
Mo. Ann. Stat. § 577.010 and § 577.012 (Supp. 1983)
Neb. Rev. Stat. § 39-669-07 (1978)
Nev. Rev. Stat. § 484.379 (1981)
N.H. Rev. Stat. Ann. § 265:82 (1982)
N.J. Stat. Ann. § 39:4-50 (West Supp. 1982-1983)
N.M. Stat. Ann. § 66-8-102 (Supp. 1983)
N.Y. Veh. & Traf. Law § 1192 (McKinney Supp. 1982-1983)
N.D. Cent. Code § 39-08-01 (Supp. 1981)
Ohio Rev. Code Ann. § 4511.19 (Page Supp. 1982)
Okla. Stat. Ann. tit. 47, § 11-902 (West Supp. 1982-1983)

(footnote continued)

those enforcement practices that exited at the time of the fourth amendment's passage." *Payton v. New York*, 445 U.S. at 591 n.33. The common-law rules governing searches and arrest evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper. *Cf. Katz v. United States*, 389 U.S. 347, 352-353 (1967). Instead, the amendment's prohibition against "unreasonable searches and seizures" must be interpreted "in light of contemporary norms and conditions." *Payton v. New York, supra*, at 591 n.33.

Several courts have already concluded that the common law rules of arrest are not part of the United States Constitution and that the states are therefore free to alter the common law and to give police the same authority to arrest for misdemeanors that they had at common law to arrest for felonies, *i.e.*, the authority to arrest for a crime committed outside their presence as long as they have probable cause. *See Street v. Surdyka*,

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Or. Rev. Stat. § 487.540 (1981)
Pa. Cons. Stat. Ann. tit. 75, § 3731 (Purdon Supp. 1983-1984)
R.I. Gen. Laws § 31-27-2 (Supp. 1982)
S.D. Codified Laws Ann. § 32-23-1 (1976)
Tenn. Code Ann. § 55-10-401 (Supp. 1982)
Tex. Veh. Code Ann. § 6701L-1 (Vernon Supp. 1982-1983)
Utah Code Ann. § 41-6-44 (Supp. 1981)
Vt. Stat. Ann. tit. 23, § 1201 (Supp. 1982)
Va. Code § 18.2-266 (1982)
Wash. Rev. Code Ann. § 46.61.515 (Supp. 1983-1984)
W. Va. Code § 17C-5-2 (Supp. 1982)
Wyo. Stat. § 31-5-229 (Supp. 1982)
D.C. Code Ann. § 40-716 (Supp. 1982)

492 F.2d 368, 371-72 (4th Cir. 1974); *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975); *United States v. Grosso*, 225 F. Supp. 161, 170 (W.D. Pa. 1964); *In the Matter of Gardner*, 39 N.C. App. 567, 251 S.E.2d 723 (1979); *City of Columbus v. Herrell*, 18 Ohio App. 2d 149, 247 N.E.2d 770, 773 (1969); *Commonwealth v. Levesque*, 469 Pa. 118, 364 A.2d 932, 937 (1976); and *State v. Berker*, 391 A.2d 107 (R.I. 1978). The rationale for these decisions was explained in *Street*, 492 F.2d at 371-72:

> The constitutional restrictions on arrest are derived from the fourth amendment's prohibition of unreasonable seizures. Because the Supreme Court has interpreted the fourth amendment in light of the law that existed when the Bill of Rights was adopted, *see, e.g., Carroll v. United States*, 267 U.S. 132, 149-51, 45 S. Ct. 280, 69 L.Ed. 543 (1925), it might be argued that the fourth amendment incorporates the common law's restrictions on warrantless arrests for misdemeanors. But the supreme court has never given constitutional force to this element of the common law. In *Bad Elk v. United States*, 177 U.S. 529, 20 S. Ct. 729, 44 L.Ed. 874 (1900), the Court applied the common law rule but hinted that its restrictions could be relaxed by statute. Subsequent cases have focused entirely on the requirement of probable cause. *See Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L.Ed.2d 142 (1964); *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, 4 L.Ed.2d 134 (1959). We do not think the fourth amendment should now be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence. *The difference between felonies and misdemeanors is no longer as significant as it was at common law. See Carroll v. United States*, 267 U.S. 132, 158, 45 S. Ct. 280, 69 L.Ed. 543 (1925). Maryland

> courts have criticized the continued use of the common law rule as impractical and illogical, and have invited the state legislature to adopt new rules. *Robinson v. State*, 4 Md. App. 515, 243 A.2d 879 (1968). Classifications based on other criteria could be both rational and practical. For example, Congress has authorized warrantless arrests on probable cause for any violation of the federal laws pertaining to narcotics or marijuana. 26 U.S.C. sec. 7607. We are most reluctant to adopt a constitutional interpretation that would impede reform in this area. The fourth amendment protects individuals from unfounded arrest by requiring reasonable grounds to believe a crime had been committed. The states are free to impose greater restrictions on arrest, but their citizens do not thereby acquire a greater federal right.

(Footnotes omitted and emphasis added.)

It has been pointed out that this Court has never held that the constitution requires a warrant to arrest for a misdemeanor occurring out of the presence of an officer. 2 LaFave, *Search & Seizure*, sec. 5.1 at 231 (1978).

In *Bad Elk v. United States*, 177 U.S. 529 (1900), which was referred to in *Street*, this Court applied the common law rule of arrest but said it could "not find any statute of the United States or of the State of South Dakota giving any right to these men to arrest an individual without a warrant on a charge of misdemeanor not committed in their presence." 177 U.S. at 535. The Court, therefore, implied that it would have been constitutional for the United States or South Dakota to pass the statute giving the police officers broader arrest authority than they had at common law.

The lawfulness of an arrest is determined by state law insofar as the law does not violate the United States Constitution. *Ker v. California*, 374 U.S. 23, 34, 37 (1963); and *Klingler v. United States*, 409 F.2d 299, 302 (8th Cir. 1969). As argued up to now, the State of Wisconsin submits that its legislature and supreme court have not acted unconstitutionally in holding that under Wisconsin's law of arrest the police have the authority to arrest the defendant in his home for drunken driving on the basis of probable cause and the existence of exigent circumstances. The arrest is constitutional because under the fourth amendment all offenses that could be classified as crimes can be treated the same and Wisconsin acted constitutionally in so treating them. Therefore, it is constitutional to judge the entry into defendant's home by the standard established in *Payton, i.e.*, did the police possess probable cause and did exigent circumstances exist?

B. Even if the common law rules of arrest were adopted as part of the United States Constitution, the arrest of the defendant was valid because drunk driving qualifies as a felony under the eighth amendment limits.

Even if this Court concludes that the common law distinctions between misdemeanor arrests and felony arrests were incorporated into the constitution by the adoption of the fourth amendment, and even if this Court applies the rule of *Payton* only to offenses that could be classified as felonies under the eighth amendment, the police acted properly in this case because drunk driving is

a serious enough offense that under the eighth amendment it could be classified as a felony.[8]/

On several occasions, this Court has acknowledged the seriousness of drunk driving.[9]/ In *South Dakota v. Neville*, _ U.S. _, 103 S. Ct. 916, 920 (1983), this Court said:

> The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here.

In *Mackey v. Montrym*, 443 U.S. 1, 17 (1979), this Court said:

> States surely have at least as much interest in removing drunken drivers from their highways

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[8]/ If the Court concludes that the common law distinctions between misdemeanors and felonies in regard to the rules of arrest were incorporated in the constitution, the state submits that for purposes of the fourth amendment the terms felony and misdemeanor should still be defined by the limits set by the eighth amendment. In other words, for the purposes of the fourth amendment, any offense should be considered a felony if it could be classified as a felony under the eighth amendment. Any other offense that could be classified as a crime, but not a felony, under the eighth amendment would be a misdemeanor. As pointed out above, this approach would ensure a uniform application of the constitution throughout the country.

[9]/ The defendant in his brief contends that the Wisconsin Legislature has determined that drunk driving is a minor offense (Brief of Petitioner at 19). The *amicus curiae* brief implies that the first offense of drunk driving in Wisconsin is not a serious offense because it does not carry a jail penalty (Brief of *Amicus Curiae* at 19-20). The state submits that the Wisconsin Legislature does not consider drunk driving to be a minor or nonserious offense. The reason the first offense of drunk driving is a forfeiture was explained in *County of Walworth v. Rohner*, 108 Wis. 2d at 718-22. In Wisconsin, the state constitution does not permit local governments to create crimes. Statutes, however, authorize local governments to create ordinances

(footnote continued)

> as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs.

(Footnote omitted.)

In the footnote to that statement, this Court pointed out that in 1975 alone drunk drivers accounted for 283 of the 884 traffic fatalities in Massachusetts; and the Court noted that traffic deaths commonly exceed 50,000 annually in the United States and approximately one half of these fatalities are alcohol related. *Mackey*, 443 U.S. at 17 n.9.

The Wisconsin Supreme Court in *Welsh* cited statistics similar to those used in *Mackey:*

> In 1980, 583 drivers were killed [in Wisconsin]. Of these drivers, 470 were tested for blood alcohol content, and 269 were found to be legally intoxicated, having a minimum blood alcohol

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prohibiting drunk driving, but the penalty must be a forfeiture.In order to treat first offense drunk drivers equally under local and state law, the state law treats first offenses as forfeitures. Therefore, the first offender receives the same treatment whether he is arrested by a state or a local official. All subsequent offenses within five years must be charged under the state law as crimes. Thus, the legislature made first offense drunk driving a forfeiture, not because it believed the offense to be minor, but in order to ensure equal treatment for all persons arrested for first offense drunk driving.

The *amicus curiae* brief cites *Baldwin v. New York*, 399 U.S. 66, 68 (1970), and *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968), as authority for the proposition that drunk driving is not a serious offense in Wisconsin *(Amicus Curiae* Brief at 20). Those cases are inapplicable to the instant case. They were concerned with the right to a jury trial under the sixth amendment. This case is concerned with the constitutionality of arrest under the fourth amendment. The fourth amendment and the sixth amendment are concerned with different interests, *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973); and therefore, sixth amendment cases are not necessarily controlling on fourth amendment issues. However, to the extent that *Baldwin* and *Duncan* are relevant to the instant case, they help the state's position. In *Baldwin*, this Court concluded that for purposes of an accused being entitled to a jury trial a "serious offense" is one in which the accused

> content of .10 percent. *Wisconsin Accident Facts* 1 (1981). Similarly in 1978, 576 drivers were killed; while 226 of the 448 tested were found to be legally intoxicated. *Wisconsin Accident Facts* 1 (1979).

Welsh, 108 Wis. 2d at 335 n.9, 321 N.W.2d at 253 n.9.

In *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957), this Court said in the context of a case where a driver was tested for intoxication:

> Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.

(Footnote omitted.)

In *State v. Jennings*, 112 Ohio App. 455, 176 N.E.2d 304, 307 (1959), the court said that an automobile becomes a dangerous instrument when it is being operated by one under the influence of intoxicating liquor and, when so operated, the automobile becomes a public menace.

Justice Marshall was reported to have made a comment in the oral argument in *Solem v. Helm*, 33 Crim. L. Rptr. 4003 (No. 82-492, argued March 29, 1983), that was similar to that made by the Ohio court. Justice Marshall was quoted as saying that a defendant's "drunk driving conviction is close to a violent act; he was lucky that something serious didn't happen. A lot of states recognize cars as dangerous weapons." 33 Crim. L. Rptr. 4005.

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faces a possible sentence of imprisonment of more than six months. In the instant case, the defendant was arrested and charged with the second offense of drunk driving and faced a possible jail sentence of one year. *See* sec. 346.65(2), Wis. Stats. (1975). Therefore, under the cases cited in the *amicus curiae* brief, the defendant was arrested for a serious offense.

In the instant case, the defendant was fortunate that his drunk driving did not result in an accident. Jablonic testified that the defendant was driving in the wrong lane of traffic and at the last moment veered off the highway avoiding a head-on collision when another car was approaching (R. 13:9)

Because the eighth amendment would permit a state to classify drunk driving as a crime, even a felony, the fourth amendment should allow a person to be arrested in his home for drunk driving on the basis of probable cause and exigent circumstances. The limits imposed by the United States Constitution should be the same throughout the country. What a police officer can do constitutionally in Wisconsin should be the same that he can do constitutionally in Texas, New York, Oklahoma and Indiana. Also, the accused persons should have the same rights under the constitution in Texas, New York, Oklahoma and Indiana as in Wisconsin.

C. *Even if the United States Constitution adopted the common law rules of arrest, and even if the labels placed on the offenses by the local legislatures are controlling, the arrest in the instant case was valid.*

Even if this Court concludes that the common law rules of arrest were made part of the constitution by the adoption of the fourth amendment and that the label placed on conduct by local legislatures determines whether the offense is a forfeiture, misdemeanor or felony for constitutional purposes, the arrest of the defendant in the instant case is valid. This is so because this Court has recognized an exception to the warrant requirement when exigent circumstances exist. This exception applies to arrests for forfeitures and misde-

meanors as well as to arrests for felonies.[10]/ In addition, this Court has approved the warrantless entry into a home to search for evidence in the case of a misdemeanor.

Decisions from this Court have indicated that the test for the warrantless entry into a home under the fourth amendment is the same for misdemeanors as for felonies — in either case the warrantless entry is valid as long as the police possess probable cause and exigent circumstances exist. When the crime is considered a felony, *Payton* is authority for entry to arrest based on probable cause and exigent circumstances. When the crime is a misdemeanor, *Camara v. Municipal Court*, 387 U.S. 523 (1967), provides authority to enter to arrest on the basis of probable cause and exigent circumstances.

In *Camara*, the Court considered whether a building inspector needed a warrant to enter a residence to check for building code violations when the resident refused to

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[10]/ The defendant has argued that a warrantless entry cannot be made at night to make an arrest for a minor offense. The state contends that, when the police possess probable cause and exigent circumstances exist, the warrantless entry can be made regardless of the time of day or the degree of the offense. For support for his argument, the defendant cites Justice White's dissenting opinion in *Payton*, which suggests that warrantless felony arrests be allowed in the home in the daytime. The state submits that the defendant's argument is incorrect for at least two reasons. First, drunken driving is not a minor offense. Second, the state submits that the defendant has misread the comment by Justice White, who said in *Payton*, 445 U.S. at 616:

> Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, *absent exigent circumstances*, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors. Further, it seems generally accepted that entries could be made only during daylight hours. And, in my view, the officer entering to

(footnote continued)

give consent for the entry. A violation of the code constituted a misdemeanor. *See* 387 U.S. at 527 n.2. This Court decided that normally search warrants are needed to enter the residence to check for code violations, 387 U.S. at 534; but the Court said its decision did not foreclose warrantless inspection in emergency situations, 387 U.S. at 539. The Court decided that the warrantless entry in the *Camara* case was invalid because there was no emergency demanding immediate access. 387 U.S. at 540.

Camara is important to the instant case because in *Camara* this Court indicated that the warrantless entry of a residence in an emergency situation to search for evidence of a misdemeanor was constitutional. In *Payton* and *Steagald,* this Court said that under the fourth amendment the same rules apply to arrest that apply to searches and seizures. *Payton,* 455 U.S. at 585, 588-89,

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arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of entry.

(Emphasis added; footnotes omitted.)

The defendant cites this statement to support his argument that nighttime warrantless arrests are invalid.

The state submits that Justice White's comment supports its position. As the state understands the *Payton* decision, Justice White dissented because he felt that the police should be able to make warrantless entries into a suspect's home to arrest him, even in the absence of exigent circumstances, as long as the officers announce their presence, demand admission, enter only in daylight and have probable cause to arrest for a felony. The state understands this to mean that when there are exigent circumstances, most of the requirements do not have to be satisfied; *i.e.,* in the case of exigent circumstances, the entry does not have to be announced, the entry can be made at night, and the arrest can be made for a misdemeanor. However, probable cause is always required.

Under this interpretation of Justice White's comments, the entry into the defendant's home was constitutional because the police had probable cause and exigent circumstances existed.

590; *Steagald*, 451 U.S. at 212. Therefore, if under *Camara* an officer can make a warrantless entry in an emergency situation to search for evidence of a misdemeanor, the officer can make a warrantless entry in an emergency situation to arrest for a misdemeanor, if the officer has probable cause. Thus, the same rule of arrest applies to misdemeanors and felonies alike. Under *Camara* and *Payton*, the officer can enter a home to make a warrantless arrest as long as he possesses probable cause and exigent circumstances exist.[11]/

This rule is no more than an application of the usual exception to the warrant requirement. The state does not dispute that normally an officer needs an arrest warrant to arrest an accused person in his home for any offense, whether it is a felony, misdemeanor or forfeiture. However, exigent circumstances typically constitute an exception to the warrant requirement. *Watson*, 423 U.S. at 431 (Powell, J., concurring), and *Watson*, 423 U.S. at 435, 437 (Marshall, J., dissenting). Therefore, the State of Wisconsin is not asking this Court to expand the authority of police officers in order to rule that the arrest in the instant case is valid. The state is only asking the Court to apply the usual rule that warrantless action is valid when exigent circumstances exist and the police possess probable cause.

The arrest of the defendant is valid even if this Court believes that the defendant was arrested for a forfeiture offense of drunk driving rather than a misdemeanor offense. In a forfeiture case, an accused is entitled to the same fourth amendment protection as in a criminal case. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 697-98 (1965). Quoting from *Boyd v. United States*, 116

[11]/ An entry into a home to make an arrest for a misdemeanor was approved in *State v. Niedermeyer*, 48 Or. App. 665, 617 P.2d 911, 913 (1980), *cert. denied*, 450 U.S. 1042 (1981), on the ground that the police possessed probable cause and exigent circumstances existed. In *Niedermeyer*, hot pursuit qualified as the exigent circumstance.

U.S. 616, 633-34 (1886), this Court said that suits for forfeiture "'are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution.'" *One Plymouth Sedan*, 380 U.S. at 697-98. The state submits that in the forfeiture proceeding the accused is entitled to the same fourth amendment rights he receives in a criminal proceeding; but that he is not entitled to any more fourth amendment rights. Therefore, the rules of arrest applicable to crimes under the fourth amendment are the same for forfeitures; and the entry of the home is valid if the police possessed probable cause and exigent circumstances existed.

To summarize, under any of the theories used by the state above, for the purposes of a constitutional challenge it makes no difference whether the defendant was arrested for an offense that was labeled as a forfeiture or a misdemeanor under Wisconsin law at the time. The arrest was valid under the fourth amendment if at the time of the arrest the police possessed probable cause to believe the defendant had committed an offense and exigent circumstances existed to justify the failure to obtain a warrant. The state submits that both requirements were satisfied in this case.

III. At The Time Of The Arrest, The Police Possessed Probable Cause To Arrest The Petitioner For The Offense Of Operating A Motor Vehicle While Under The Influence Of An Intoxicant.

The defendant was arrested in his home for operating a motor vehicle while under the influence of an intoxicant (R. 13:38; J.A. 46).

The elements of that offense are that the accused (1) drove or operated a motor vehicle and (2) that he did so

while under the influence of an intoxicant. *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867.

The Wisconsin Supreme Court found that the police had probable cause to arrest the defendant. *Welsh*, 108 Wis. 2d at 329-35, 321 N.W.2d at 251-54. In this Court, the defendant has not challenged that conclusion of the Wisconsin Supreme Court. Therefore, in this Court there is no question that the police had probable cause to arrest the defendant. The first requirement of a valid warrantless arrest has been satisfied.

IV. Exigent Circumstances Existed To Justify The Warrantless Arrest Of The Defendant.

The Wisconsin Supreme Court found that for three reasons exigent circumstances existed to justify the immediate, warrantless arrest of the defendant in his home. The circumstances cited by the Wisconsin Supreme Court were hot pursuit, the imminent threat to safety doctrine and the probable destruction of evidence. *Welsh*, 108 Wis. 2d at 336-39, 321 N.W.2d at 254-55.

A. Hot pursuit.

This Court has long recognized that "hot pursuit" cases fall within the exigent circumstances exception to the warrant requirement. *Steagald*, 451 U.S. at 218; *United States v. Santana*, 427 U.S. 38, 43 (1976); and *Warden v. Hayden*, 387 U.S. 294 (1967).

In *Santana*, this Court said that hot pursuit involves some sort of a chase. 427 U.S. at 43. However, some cases since *Santana* have justified warrantless entries even though the police did not chase the accused persons into the homes. In these cases the offenses were quickly reported to the police who acted on the basis of informa-

tion received from witnesses and arrived at the suspects' homes within minutes of the commission of crimes. *United States v. Stubblefield*, 621 F.2d 980, 982-83 (9th Cir. 1980), and *People v. Baca*, 198 Colo. 399, 600 P.2d 770, 772 (1979). Two other cases have approved the warrantless entries of homes to arrest suspects for misdemeanors when the police possessed probable cause and hot pursuits satisfied the exigent circumstance requirement. *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978), and *Niedermeyer*, 617 P.2d at 913.

In *Welsh*, the Wisconsin Supreme Court said that the hot pursuit doctrine has evolved to encompass situations where time was of the essence, *i.e.*, where requiring the police to obtain a warrant would constitute undue delay. 108 Wis. at 336, 321 N.W.2d at 254. This analysis is consistent with the approach used by the courts in *Stubblefield* and *Baca*.

The Wisconsin Supreme Court pointed out that the defendant, "fearful of the officer's impending arrival and recognizing the possibility of being requested to submit to a blood alcohol test, left the scene of the accident upon discovering that the officer had been summoned." 108 Wis. 2d at 336, 321 N.W.2d at 254. Randy Jablonic had testified that when the defendant approached his truck Jablonic refused to give him a ride home and told him to wait to get help to get the car out (R. 13:12). Jablonic then testified that the defendant was concerned that he (Jablonic) would call the cops. (R. 13:12).

The defendant left Jablonic and walked to his home. The police arrived at the accident scene, talked to Jablonic and went to the defendant's home. The trial court concluded that the police arrived at the defendant's home within ten minutes of the defendant leaving the accident scene (R. 14:35; J.A. 79).

Emphasizing the importance of quick action by the police, the Wisconsin Supreme Court said that if the

officers had retreated to obtain a warrant "rather than immediately pursuing and arresting the suspect, the requirements of the blood alcohol statutes would have been frustrated." *Welsh*, 108 Wis. 2d at 336, 321 N.W.2d at 254.

The hot pursuit doctrine applied to these facts where the defendant left the accident scene when he learned that the police had been called and where the police responded quickly to the call for assistance and were able to reach the defendant's home within ten minutes of his leaving the accident scene. As noted by the Wisconsin Supreme Court, time was of the essence because the police had to preserve evidence of the defendant's level of alcohol consumption. This required quick action by the police and justified the hot pursuit. As will be discussed later, the need to prevent the destruction of evidence also supplied an independent ground for finding the existence of exigent circumstances. However, that ground was in addition to the hot pursuit.

B. The imminent threat to safety.

The Wisconsin Supreme Court also justified the warrantless arrest of the defendant on the ground that prompt action by the police prevented "the driver from returning to his car, or another automobile, where he could have continued to drive in his current state posing a danger to himself and the public." *Welsh*, 108 Wis. 2d at 337, 321 N.W.2d at 255. The Wisconsin court concluded that the nature of the offense, coupled with the potential threat to public safety, satisfied the exigent circumstances test pursuant to the imminent threat to safety doctrine. 108 Wis. 2d at 337-38, 321 N.W.2d at 255.

In *State v. Martin*, 275 S.C. 141, 268 S.E.2d 105, 107 (1980), the South Carolina Supreme Court said a police officer was justified in making a warrantless arrest of a suspected drunken driver at an accident scene because

"[a]n intoxicated person who has just been in an accident and who still has the opportunity to operate his vehicle presents a clear and present danger to the community." Thus, the South Carolina Supreme Court also recognized that the danger posed by a drunk driver returning to his car and driving can justify action by the police that might otherwise be illegal.

In the instant case, the defendant contends that he posed no danger to the community because he had returned home, undressed and gone to bed. However, in making this argument the defendant forgets that this Court must be concerned with information known to the police officer, not the facts known by the defendant. When the police officers entered the defendant's home there was no way for them to know that he was in bed. For all the officers knew, the defendant was prepared to walk the short distance to his car to retrieve it from the cemetery and to continue driving about the city in his intoxicated condition. Therefore, the fact that the defendant was in bed cannot defeat an otherwise valid reason for the police to act in the interest of defusing a threat to public safety.

C. Prevention of the destruction of evidence.

The final reason the Wisconsin Supreme Court gave for finding that exigent circumstances existed was that an immediate arrest was needed to prevent the probable destruction of evidence. 108 Wis. 2d at 338, 321 N.W.2d at 255. The court noted that alcohol rapidly metabolizes in the blood after a person stops drinking and "[w]ithout an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of the defendant's alleged violation" of the drunk driving law would be destroyed. 108 Wis. 2d at 338, 321 N.W.2d at 255.

The state submits that the prevention of the imminent destruction of evidence provides the strongest reason for finding that in the instant case exigent circumstances existed to justify the warrantless entry of the defendant's home to arrest him.

This Court has recognized that the threat of the removal or destruction of evidence, when coupled with probable cause, justifies a warrantless entry of a suspect's home to arrest or to search. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *United States v. Santana*, 427 U.S. 38, 43 (1976); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *McDonald v. United States*, 335 U.S. 451, 455 (1948); and *Johnson v. United States*, 333 U.S. 10, 15 (1948).

In *Schmerber v. California*, 384 U.S. 757, 770-71 (1966), this Court ruled that the diminishing of the percentage of alcohol in the blood that begins shortly after drinking stops justified the warrantless seizure of a blood sample from a suspected drunken driver. The Court ruled that this threatened destruction of evidence posed an emergency that justified the warrantless action. 384 U.S. at 770-71. Numerous other courts have agreed with *Schmerber* that the loss of alcohol from the blood constitutes an exigent circumstance that permits the warrantless seizure of evidence. *United States v. Harvey*, 701 F.2d 800, 803 (9th Cir. 1983); *People v. Rodriguez*, 645 P.2d 857, 860 (Colo. Ct. App. 1982); *State v. Williams*, 417 So. 2d 755, 756 (Fla. Ct. App. 1982); *People v. Bell*, 41 Ill. App. 3d 233, 355 N.E.2d 38, 40-41 (1976); *DeVaney v. State*, 259 Ind. 483, 288 N.E.2d 732, 735 (1972); *Pollard v. State*, 439 N.E.2d 177, 182, 183 (Ind. Ct. App. 1982); *Shultz v. State*, 417 N.E.2d 1127, 1138 (Ind. Ct. App. 1981); *State v. Oevering*, 268 N.W.2d 68, 72 (Minn. 1978); *Gregg v. State*, 374 So. 2d 1301, 1303-04 (Miss. 1979); *State v. Campbell*, 615 P.2d 190, 196 (Mont. 1980); *State in Interest of M.P.C.*, 165 N.J. Super. 131, 397 A.2d 1092, 1094 (1979); *Commonwealth v. Trefry*, 249 Pa. Super. 117, 375 A.2d 786, 793 (1977); *Hayes v. State*, 634 S.W.2d 359, 363 (Tex. Ct. App.

1982); and *Aliff v. State*, 627 S.W.2d 166, 169, 170 (Tex. Ct. App. 1982).

In *Schmerber*, this Court said that ordinarily search warrants would be required to obtain a blood sample from a suspect:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.

384 U.S. at 770.

In comparing the search of a dwelling with the search of a human body, this Court indicated that absent a warrant the state would have to make as great a showing of an emergency to search the body as to search the home. In *Schmerber*, the possible destruction of evidence by the alcohol metabolizing in the blood qualified as an emergency justifying the warrantless seizure of the blood sample from the body. If loss of evidence of intoxication justifies entering the human body, then, under *Schmerber*, it logically follows that the threat of loss of the same evidence justifies entry into a home to obtain the evidence. Since the fourth amendment rules governing search and seizure are the same as those governing arrest, *Payton*, 445 U.S. at 590; *Steagald*, 451 U.S. at 212, the prevention of the loss of evidence of intoxication provides the emergency needed to make the warrantless entry into the home to arrest the defendant and to obtain evidence of the level of alcohol in the blood.

In other cases this Court has implied even more strongly that the prevention of the destruction of intoxication provides the exigent circumstance needed to make a warrantless entry into a home. In *Vale*, the warrantless entry into the suspect's home was ruled unconstitutional. In explaining why the entry was illegal, this Court noted that no one claimed that the police were responding to an

emergency. 399 U.S. at 35. The Court said: "The goods ultimately seized were not in the process of destruction. *Schmerber v. California*, 384 U.S. 757, 770-71." *Vale*, 399 U.S. at 35.

The state submits that it is significant that this Court cited *Schmerber* in a home entry case. The citation of *Schmerber* in *Vale* indicates that the threat of the destruction of the evidence of alcohol in the blood would justify the warrantless entry into the home. Such a justification exists in the instant case.

Also, in *Camara*, this Court cited *Schmerber* as a case exemplifying the type of situation where a warrant is not necessary because "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." 387 U.S. at 533. The citation of *Schmerber* in *Camara* is important because the issue in that case was whether a warrant was required to enter a residence to search for evidence of a misdemeanor violation of the building code. In other words, the citation of *Schmerber* in *Camara* indicates that the loss or the destruction of alcohol in the blood would justify the warrantless entry into the home to search for evidence of a misdemeanor.

Camara also adds further support to the state's position when read together with *Mackey v. Montrym*, 443 U.S. 1 (1979). In *Camara*, this Court said that the warrantless entry of the residence to search for a misdemeanor building code violation would be justified in emergency situations, such as the seizure of unwholesome food in *North American Cold Storage Company v. City of Chicago*, 211 U.S. 306 (1908). *See Camara*, 387 U.S. at 539. In *Mackey*, this Court said that states have at least as much interest in removing drunk drivers from their highways as in summarily destroying spoiled foodstuffs, citing the same *North American Storage* case that was cited in *Camara*. *See Mackey*, 443 U.S. at 17-18. The state

submits that if its interest in seizing unwholesome food creates a sufficient emergency to justify the warrantless entry of a residence, as implied in *Camara*, 387 U.S. at 539; and if the state's interest in removing drunk drivers from the highway is as sufficient as seizing unwholesome food, as stated in *Mackey*, 443 U.S. at 17-18; then the state's interest in removing drunk drivers from the highway should justify the warrantless entry into the suspect's home, especially when the entry is made only to avoid the destruction of evidence that will surely be lost unless quickly seized.

The defendant argues that, for three reasons, the prevention of the loss of evidence of alcohol in the blood is not sufficient to justify the warrantless entry into the home. First, the defendant contends that the evidence may not be obtained anyway because he may refuse to give his consent to the breathalyzer test. However, under *Schmerber*, the state could forceably obtain evidence of the alcohol level in the blood. *See Neville*, 103 S. Ct. at 921; and *Trefry*, 375 A.2d at 792. Also, if the defendant refuses to give his consent to the test, the state can introduce evidence of the refusal at the defendant's trial on drunk driving. *Neville*, 103 S. Ct. at 916.

Second, the defendant contends that he may drink more alcohol before the police reach his home and thereby he will destroy the validity of any test. The state submits that this possibility is the strongest reason for permitting the police to make a warrantless entry to prevent the destruction of evidence. The time the police would take to obtain a warrant provides the defendant with even more time to drink more alcohol and to destroy the validity of a test. In order to reduce the chances of the defendant drinking more alcohol, the police must be permitted to enter the defendant's home and arrest him as soon as possible.

Finally, the defendant contends that alcohol does not dissipate all that quickly in the blood so that there

will be time to obtain a warrant, arrest the defendant and conduct a test before all the alcohol has dissipated.

It is obvious that in some cases tests concluded three or more hours after the driving have shown alcohol levels in the blood that exceeded the legislatively mandated level of intoxication. However, it cannot be certain that in all cases the alcohol level will be that high after three hours. Over the course of three hours the alcohol level will surely be reduced because, as pointed out in *Schmerber*, 384 U.S. at 770, the percentage of alcohol in the blood begins to diminish shortly after the drinking stops. In the case of the defendant, the police did not know when he had stopped drinking; it may have been a long time before he drove. The police only had probable cause to believe that the defendant was intoxicated when he drove. There was no way for the police to know that the defendant's level of intoxication would not go below the statutory level of intoxication if time was taken to obtain a warrant. Even if the percentage of alcohol did not go below the statutory level of intoxication, the percentage of alcohol in the blood would have diminished during the time the warrant was obtained and evidence would have therefore been destroyed. To prevent the destruction of evidence, the police were justified in entering the defendant's home to arrest him.

This Court has recognized the importance of early testing for intoxication:

> The Commonwealth must have the authority, if it is to protect people from drunken drivers, to require that the breath-analysis test record the alcoholic content of the bloodstream at the *earliest possible moment.*

Mackey, 443 U.S. at 15 (emphasis added).

Other courts have also concluded that, because the alcohol content in the blood diminishes after drinking

stops, the test for intoxication must be completed as soon as possible after the offense. *Brown v. Municipal Court of Los Angeles*, 86 Cal. App. 3d 357, 150 Cal. Rptr. 216, 220 (1978); *Williams*, 417 So. 2d at 756; *DeVaney*, 288 N.E.2d at 735; *State v. Spence*, 418 So. 2d 583, 586 (La. 1982); *Tefry*, 375 A.2d at 793; and *Martin*, 268 S.E.2d at 107-08.

Because it is necessary to test for the level of intoxication as soon as possible, there is not time for the police to obtain a warrant before entering the defendant's home to arrest him. The state has observed that few, if any, of the cases that allow the warrantless seizure of the blood samples even discuss the time it would take to obtain a warrant. In *Schmerber*, this Court said the officer could conclude that an emergency existed and the Court did not mention the time necessary to obtain the warrant. The courts have recognized that during the time it takes to get a warrant — however long that may be — evidence will be lost. Therefore, the courts have allowed the immediate seizure of the evidence. This rationale also permitted the police in the instant case to enter the defendant's home without a warrant in order to obtain evidence of intoxication before the evidence was lost.

The state submits that for the reasons discussed in this section of the brief, exigent circumstances existed to justify the warrantless entry into the defendant's home. The exigent circumstances coupled with the probable cause possessed by the police resulted in a constitutional arrest of the defendant in his home. For reasons discussed earlier in the brief, the arrest was valid whether this Court concludes that the defendant was arrested for a forfeiture offense of drunk driving or for a misdemeanor offense of drunk driving. In either case, drunk driving is a serious offense that could be classified as a crime, even a felony, within the guidelines of the eighth amendment.

V. This Court Should Not Require The Police To Seek A Telephone Warrant Before Entering The Defendant's Home To Arrest Him.

The defendant contends that before they could justify the warrantless entry of his home to arrest him, the police should be required to show that obtaining a telephone warrant would have been impracticable.

The state submits that the unavailability of a telephone warrant should not be made a requirement for justifying a warrantless entry. At the time of the arrest in the defendant's case, Wisconsin did not provide a procedure for obtaining such a warrant. In addition, at no time prior to filing his brief in this Court did defendant contend that the police should have sought a telephone warrant.

In any event, in the context of this case, the police should not be required to seek even a telephone warrant because during the time taken to obtain it evidence would have been lost. Not as much evidence may be lost in obtaining a telephone warrant as in obtaining a regular warrant, but some evidence nonetheless will be lost because the alcohol will continue to dissipate in the blood while time is taken to obtain the warrant.

Finally, the state is not aware of any case where this Court has ruled that the telephone warrant procedure is constitutional. The state submits that it would be premature for this Court to require the police in this case to have sought a telephone warrant when this Court has not ruled that the telephone warrant procedure is constitutional.

VI. A Decision Invalidating The Entry Into The Defendant's Home Would Hamper Effective Law Enforcement.

The defendant argues at the end of this brief that invalidating the entry into his home would not hamper effective law enforcement. The defendant urges this Court to adopt a "bright line" rule prohibiting the police, without a warrant, from entering a home to arrest a suspect whose only offense is minor.

Of course, the state contends that such a rule would not apply in the instant case anyway because drunk driving is more than a minor offense. However, if drunk driving were a minor offense, the defendant's rule would seriously hamper the enforcement of the drunk driving laws. The rule would permit the drunk driver to race home and avoid immediate arrest as long as he did not commit a serious offense, which the defendant would apparently define as a felony. Needed evidence of intoxication would be lost while the police sought a warrant. The defendant's rule does not even allow an entry without a warrant in those areas of the country that are sparsely populated and where obtaining a warrant can take a great deal of time. In addition, because the defendant does not want to permit a warrantless arrest in the case of minor offenses, he would apparently not allow the police to enter a home to stop a battery that in Wisconsin is a misdemeanor. *See* sec. 940.19(1), Wis. Stats. (1981). In other words, the defendant's rule would not permit the police to make a warrantless entry into a home to stop a crime of violence. This single example shows how impractical and dangerous the defendant's proposed rule is. The rule should be rejected and this Court should apply the normal rule that dispenses with the warrant requirement where the police possess probable cause and exigent circumstances exist. That exception was satisfied in the instant case.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this Court to affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

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No. 82-5466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDWARD G. WELSH

PETITIONER,

v.

STATE OF WISCONSIN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR PETITIONER

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EDWARD G. WELSH

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REPLY BRIEF FOR PETITIONER

I. THE NATURE AND QUALITY OF THE UNDERLYING OFFENSE, AS DETERMINED UNDER STATE LAW, IS RELEVANT IN MEASURING THE REASONABLENESS OF THIS NONCONSENSUAL AND WARRANTLESS ENTRY INTO THE DEFENDANT'S HOME

Respondent's argument does not support the home arrest of Edward Welsh on the grounds advanced by the Supreme Court of Wisconsin (Brief of Respondent at 11). The State makes the unusual

argument that this Court can ignore the Wisconsin Supreme Court's conclusion that the defendant was arrested under a Wisconsin statute authorizing arrests of traffic offenders. The State's claim is without support. On matters of state law this Court has long held that state courts speak with final authority, unless in so doing they violate constitutionally protected rights. Justice Jackson summarized the rule:

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); see also Florida v. Casal, ___ U.S. ___, 51 U.S.L.W. 4827 (June 17, 1983) (Burger, C.J. concurring); Kolender v. Lawson, ___ U.S. ___, 51 U.S.L.W. 4532, 4533 (May 2, 1983);

Murdock v. Memphis, 20 Wall. 590, 635 (1875); see generally C. Wright, Handbook of the Law of Federal Courts 488 (2nd ed. 1970).

The respondent confuses the arrest with the charge (Brief of Respondent at 8). The reasonableness of defendant's arrest is the issue, and reasonableness involves the arrest statute, not the subsequent charging decision as respondent suggests (Brief of Respondent at 10-11). The penalty for first offenders arrested for traffic offenses is a civil forfeiture.

The penalty a state attaches to an offense helps measure the reasonableness of a trial by judge alone, Baldwin v. New York, 399 U.S. 66, 68 (1970); Duncan v. Louisiana, 391 U.S. 145, 160 (1968). It has likewise considered the penalties attached under state law in determining whether a penalty is cruel and unusual,

Solem v. Helm, ___ U.S. ___, 51 U.S.L.W. 5019, 5024 n.20 (June 28, 1983). Similarly one of the components of reasonableness under the Fourth Amendment's standards is the seriousness with which the government views an offender. McDonald v. United States, 335 U.S. 451, 459 (1948) (Jackson, J., concurring); Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970 en banc). Reasonableness is measured by balancing the invasion which occurs with the governmental interest asserted to justify a seizure, see Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 535 (1967). Wisconsin's Supreme Court plainly identified the governmental interest here as an application of its traffic arrest statute.

Respondent invokes, as authority for an independent review of the statutory basis for defendant's arrest, the prin-

ciple that not every violation of state arrest law triggers a violation of the Fourth Amendment, see Street v. Surdyka, 492 F.2d 368, 370 (4th Cir. 1974), Brief of Respondent at 22-24. Street was correctly decided, but it does not supply any authority suggesting that this Court should ignore the Wisconsin Supreme Court's characterization of the defendant's arrest.

II. WHETHER WISCONSIN'S POLICE COULD HAVE LAWFULLY ARRESTED THE DEFENDANT OUTSIDE HIS HOME FOR THE OFFENSE CHARGED IS NOT AN ISSUE FOR THIS COURT

The respondent asserts that the defendant claims that he "could not constitutionally be arrested even for the misdemeanor offense of drunk driving and even in a public place." (Brief of Respondent at 13.) This argument was suggested in the Wisconsin Supreme Court in the dissenting opinion of Justice

Abrahamson. The defendant only states that the common law rule, forbidding arrests for minor offenses not committed in the presence of the police, and not constituting a breach of the peace, "is sound, especially as it applies to warrantless nonconsensual entries into the home." (Brief of Petitioner at 34.) We argue that the exigent circumstances doctrine does not justify a home entry here. Contemporary norms and conditions, relevant in evaluating the reasonableness of a search and seizure, confirm the common law. People are entitled to more protection in their homes than outside, and governmental invasions of that privacy must be subjected to extraordinarily strict scrutiny, cf. Bolger v. Young's Drug Products, ___ U.S. ___, 51 U.S.L.W. 4961, 4966 (June 24, 1983) (Rehnquist, J., and O'Connor J. concurring).

The defendant does not claim that a state may never allow arrests for minor offenses unless committed in the presence of the police (Brief of Respondent at 13). The defendant does point out, however, that such power is rarely asserted and is contrary to the thoughtful recommendations in the American Law Institute's Model Code of Pre-Arraignment Procedure. (Brief of Petitioner at 28). See also State v. Cormican, 292 Minn. 505, 195 N.W.2d 586 (1972). Moreover, even the law of Wisconsin ordinarily commands that magistrates issue summons in preference to warrants (Brief of the Wisconsin Civil Liberties Union Foundation at 22). Whether or not Wisconsin law authorizes arrests for minor out of presence offenses must first be evaluated under the Law of Wisconsin. The majority in the Supreme Court of Wisconsin did not focus upon

that issue (see State v. Welsh, 108 Wis. 2d 319, 344, 321 N.W.2d 245, 258, J.A. 180 (Abrahamson, J. dissenting). It would, of course, be bizarre to allow a policeman to enter a home but forbid a magistrate at his elbow from issuing a warrant to authorize the entry.

III. THE ISSUE BEFORE THIS COURT IS WHETHER SUFFICIENT JUSTIFICATION EXISTED TO PERMIT A WARRANTLESS NONCONSENSUAL ENTRY, NOT WHETHER PROBABLE CAUSE EXISTED

The Supreme Court of Wisconsin found, and the respondent continues to assert, that the police had probable cause to arrest Edward Welsh (Brief of Respondent at 33-34). That is not the problem. Defendant claims that even if the informer's testimony, coupled with Officer Daley's suspicions, supplied probable cause to arrest (see Illinois v. Gates, ___ U.S. ___, 51 U.S.L.W. 4685 (June 8, 1983)), there was insufficient

justification to authorize a nonconsensual warrantless entry into Welsh's home. Probable cause to arrest does not establish justification to enter, Payton v. New York, 445 U.S. 573, 583 (1980). In 1981 a unanimous House of Lords confirmed this rule by holding that police could not enter a home to arrest a suspect to administer a blood test. Finnigan v. Sandiford, Clowser v. Chaplin, [1981] 2 All E.R. 267.

IV. THE "HOT PURSUIT" DOCTRINE IS INAPPLICABLE TO THIS CASE

Respondent invokes the "hot pursuit" doctrine (Brief of Respondent at 34). That doctrine, evidently a branch of the exigent circumstances rule, evolved uncertainly in the context of police engaged in a chase of a suspect who had no

right to flee.* In this case, however, the State has not claimed that Edward Welsh had a duty to stand by his automobile and wait. Of course such a duty would exist had there been injury or damage, see Wis. Stat. 346.67.[1]

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*If the defendant had been stopped at his door, the police could have pursued to make an arrest. Hart v. Chief Constable of Kent, [1983] Crim. L.R. 117 (Queen's Bench, D.C.).

[1]346.67 Duty upon striking person or attended or occupied vehicle. (1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the following requirements:

(a) He shall give his name, address and the registration number of the vehicle he is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(b) He shall, upon request and if

Indeed, had there been injury or damage the suspect could have been sought for a more serious offense. In some cases the failure to remain at the scene of an accident is a felony, see State ex rel McDonald v. Douglas Cty. Cir. Ct., 100 Wis.2d 569, 302 N.W.2d 462 (1981). No one was injured, no damage was done, and hence Edward Welsh did what the law allows, he went home to bed!

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available, exhibit his operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(c) He shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

V. INASMUCH AS THE UNDERLYING OFFENSE WAS NOT CONSIDERED SERIOUS BY THE STATE, AND BECAUSE OF THE ABSENCE OF AN URGENT EMERGENCY, THE EXIGENT CIRCUMSTANCES DOCTRINE IS NOT APPLICABLE TO THIS CASE

The emergency which the State of Wisconsin claims justifies the home entry and arrest in this case is the fact that the percentage of alcohol in the blood in due course drops to zero (Brief of Respondent at 37). It does so not immediately but over a period of time. Blood tests are permitted now within three hours of the time of arrest, and longer if experts testify on reliability (Brief of Respondent at 42). In one of the cases respondent cites a reliable blood test was taken four hours after the offense, State v. Oevering, 268 N.W.2d 68 (Minn. 1978).

The cases cited by respondent (Brief of Respondent at 38) all involve one of several situations:

1) Where a defendant was lawfully arrested and subjected to a blood alcohol test, either after, or contemporaneously with, a lawful arrest. United States v. Harvey, 701 F.2d 800 (9th Cir. 1983); Commonwealth v. Trefry, 249 Pa. Super. 117, 375 A.2d 786 (1977); Gregg v. State, 374 So.2d 1301 (Miss. 1970); Shultz v. State, 417 N.E.2d 1127 (Ind. Ct. App. 1981).

2) Where the offense took place in the presence of the officer. See State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978) (Brief of Respondent at 35); People v. Bell, 41 Ill. App. 3d 233, 355 N.E.2d 38 (1976); State v. Niedermeyer, 48 Ore. App. 665, 617 P.2d 911 (1980), cert. denied, 450 U.S. 1042 (1981) (Brief of Respondent at 32 n.11); see also Illinois v. Batchelder, ___ U.S. ___, 51 U.S.L.W. 3933 (July 6, 1983) (per curiam).

3) Where the defendant was in a hospital and a blood test was sought in circumstances where no privacy interest was invaded. People v. Rodriguez, 645 P.2d 857 (Colo. Ct. App. 1982); State v. Williams, 417 So. 2d 755 (Fla. Ct. App. 1982 - 3 hours after accident); DeVaney v. State, 259 Ind. 483, 288 N.E.2d 732 (1972); State in Interest of M.P.C., 165 N.J. Super. 131, 397 A.2d 1092 (1979); Hayes v. State, 634 S.W.2d 359 (Tex. Ct. App. 1982); Aliff v. State, 627 S.W.2d 166 (Tex. Ct. App. 1982); State v. Campbell, 615 P.2d 190 (Mont. 1980); State v. Oevering, 268 N.W.2d 68 (Minn. 1978); Pollard v. State, 439 N.E.2d 177 (Ind. Ct. App. 1982). Medication and treatment may diminish the value of a delayed blood alcohol test. Hence, the warrant requirement is excused.

In all of these cases the police, when they sought a blood alcohol test,

were where they had a right to be. Police had no right to be in Edward Welsh's home unless they entered with consent, or with a warrant. They were in no legitimate position to either arrest, or to observe, the defendant. See Texas v. Brown, ___ U.S. ___, 51 U.S.L.W. 4361, 4363 (April 19, 1983).

VI. A DECISION FAVORING THE DEFENDANT WOULD NOT HAMPER LAW ENFORCEMENT

Respondent asserts that the defendant's claim would, if honored, "not allow the police to enter a home to stop a battery," or "make a warrantless entry into a home to stop a crime of violence." (Brief of Respondent at 45). This is not defendant's claim. Anyone, including the police, may enter a home to save life or limb, or to render necessary first aid. Such entries are allowed under the "emergency doctrine."

(Brief of Petitioner at 54 n.28). This case would be entirely different had police at the door heard the sound of breaking crockery and a cry for "help!"

This Court has implied, and other courts have uniformily held, that expediency does not create exigency. (Brief of Petitioner 60-62.) See also Michigan v. Anthony, 120 Mich. App. 207, 327 N.W.2d 44 (1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3872 (June 6, 1983); Finnigan v. Sandiford, cited p. 9 supra (House of Lords, 1981).

CONCLUSION

For the reasons previously stated, the judgment in this case should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

Office-Supreme Court, U.S.
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CLERK

No. 82-5466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD G. WELSH

Petitioner,

—v.—

THE STATE OF WISCONSIN

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF FOR THE WISCONSIN CIVIL LIBERTIES UNION FOUNDATION AS *AMICUS CURIAE*

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April, 1983

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INTEREST OF *AMICUS CURIAE*

The Wisconsin Civil Liberties Union Foundation is a nonpartisan Wisconsin organization dedicated to preserving and protecting the liberties safeguarded by the United States Constitution and its Bill of Rights. It is associated with the Wisconsin Civil Liberties Union, a 4,000 member organization which is the Wisconsin state affiliate of the American Civil Liberties Union.

This case presents serious questions regarding the strength of the Fourth Amendment protection against unreasonable searches and seizures, a provision of critical importance to our Bill of Rights.

Written consent of the parties for the filing of this brief *amicus curiae* has been supplied to this Court.

SUMMARY OF ARGUMENT

Warrantless searches and seizures are presumatively unreasonable under the Fourth Amendment. The home is especially protected from government intrusion. Exceptions to the warrant requirement are jealously and carefully drawn.

Warrantless home entries are allowed only in exigent circumstances. Exigency may exist where the nature of the intrusion is minor compared to the need for the protection of the community which the search or seizure seeks to accomplish. Even then, the intrusion is justified only if it is imperative in order to achieve the community protection.

An appropriate measure of the relative importance of the community objective which the intrusion seeks to protect is the classification of a law violation as a felony, misdemeanor, "petty" misdemeanor, or forfeiture action. Unless this Court

would allow the exceptions to swallow the rule of the Fourth Amendment, no warrantless police intrusion of a private home can be justified merely to preserve evidence for use in a civil forfeiture action.

Furthermore, under Wisconsin law, no magistrate has the authority to issue an arrest warrant for the violator of a non-criminal law, absent a showing that the defendant would fail to appear in response to a summons. It would be perverse to allow the police to invade a private residence without judicial authorization under circumstances in which no judicial authorization could legally be obtained.

The Fourth Amendment would be seriously weakened were police allowed into private homes absent consent and without a warrant for the purpose of

preserving evidence that a non-criminal law violation has occurred. The people would no longer be secure in their houses because government agents would be free to conduct searches and seizures in the home upon probable cause that a resident had exceeded posted speed limits or spit on the sidewalk, if the officer thought the "identity" of the perpetrator had to be learned to be preserved.

ARGUMENT

Edward G. Welsh was at home, undressed in his bed when two police officers entered his upstairs bedroom to arrest him for drunk driving. Mr. Welsh was accused of having operated an automobile while intoxicated earlier that evening. (J.A. 44, 46). The police officers had not observed the driving; they were acting on the report of a citizen witness. (J.A. 32, 33). The officers had no warrant for the arrest of Mr. Welsh, and no warrant to search for evidence of any offense. (J.A. 14).

In Wisconsin, driving under the influence of an intoxicant is a non-criminal offense, the violation of which subjects an individual to a money forfeiture. Only if the violator has been previously convicted of an intoxicated driving offense within the last

five years does the current matter become criminal in nature. For the second and subsequent offense within five years, the violation is a misdemeanor, subjecting the defendant to a fine and imprisonment up to one year. This statutory arrangement was in effect at the time of Mr. Welsh's arrest, and remains in effect today. Wis. Stat. Ann. §346.63(1)(a) and 346.65(2).

The record in this case indicates nothing to suggest that the officers who arrested Mr. Welsh in his bedroom had reason to believe Welsh had previously been convicted for driving while intoxicated. (J.A. 46). The only inference which this record supports is that Mr. Welsh was arrested as a violator of a non-criminal traffic regulation.

I. THE FOURTH AMENDMENT PROTECTS BASIC SOCIETAL VALUES OF INDIVIDUAL FREEDOM AND LIBERTY

The Bill of Rights protects the precious heritage of individual freedom and personal liberty for the people of the United States. This Court has referred to the Fourth Amendment protection against the warrantless police intrusion into private living quarters as

> "one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Johnson v. United States, 333 U.S. 10, 17 (1948).

The Fourth Amendment stands as a barrier to shield people from improper intrusions by agents of government. The language of this Amendment is absolute in its guarantee that the right of

security in one's home against unreasonable searches and seizures "shall not be violated". U.S. Const. amend. IV.

Interpreting the word "unreasonable" in the Fourth Amendment, this Court has unyieldingly held that searches and seizures executed on private property without a warrant are presumptively unreasonable. Camara v. Municipal Court, 387 U.S. 523, 528, 529 (1967), Mincey v. Arizona, 437 U.S. 385, 390 (1978).

The personal security protections of the Fourth Amendment "should be liberally construed", Boyd v. United States, 116 U.S. 616, 635 (1886), and relief from the warrant requirement is available only "in a few 'jealously and carefully drawn' exceptional circumstances". United States v. Watson, 423 U.S. 411, 427 (1976) (Powell, J., dissenting) (citations omitted).

Because of the importance of the "right of privacy as one of the unique values of our civilization", McDonald v. United States, 335 U.S. 451, 453 (1948) warrants are always required for home entries by police unless the situation evidences a "grave emergency". McDonald v. United States, 335 U.S. at 455. The absence of a warrant cannot be excused

> "without a showing by those who seek exemption from constitutional mandate that the exigencies of the situation made that course imperative."

McDonald v. United States, 335 U.S. at 456.

In enforcing the guarantees of the Fourth Amendment, this Court has given special recognition to "the sanctity of private dwellings". United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976). Examination of the purpose and history of this constitutional provision reveals that "physical entry of the

home" by police or other government agents "is the chief evil against which the wording of the Fourth Amendment is directed". United States v. United States District Court, 407 U.S. 297, 313 (1972).

In 1961 the Opinion of a unanimous Court called upon the "long history" of the Fourth Amendment and stated:

> "At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Silverman v. United States, 365 U.S. 505, 511 (1961). More recently this Court has maintained its insistence that one's home be generally regarded as a safe haven.

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and

> specific constitutional terms, ... In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house."

Payton v. New York, 445 U.S. 573, 589, 590 (1980).

II. WARRANTLESS NON-CONSENSUAL POLICE ENTRIES INTO PRIVATE HOMES AT NIGHT TO PRESERVE EVIDENCE OF NON-CRIMINAL TRAFFIC VIOLATIONS ARE NOT JUSTIFIED.

Respondent would justify the unwelcome visit of the police to Mr. Welsh's bedroom as being required by the exigencies of the situation. It is claimed that evidence of Mr. Welsh's alleged drunk driving would dissipate over time if the Constitution interfered with an immediate arrest. Assuming, *arguendo*, evidence would diminish if the officers took time in an attempt to secure a

warrant, the warrantless, non-consensual entry is still not legitimate.

A balancing test is used to judge, categorically, the validity of searches and seizures in various situations.

> "...the constitutionality of a particular search is a question of reasonableness and depends on 'a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers'"

Mincey v. Arizona, 437 U.S. 385, 406 (separate opinion of Rehnquist, J.) (1978), quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

In the instant case, the state seeks indicia of drunk driving in the form of blood alchohol level test results. The public interest in obtaining this additional evidence for use in a non-criminal, traffic regulation forfeiture action is overwhelmed by the importance of the protection which the Fourth

Amendment guarantees, in light of the severity of the governmental intrusion upon personal liberty here.

Repeatedly, this Court has pointed out the significance and public importance of felony matters as compared to non-felonies. On the precise question of police authority to make warrantless arrests, this distinction is clearly drawn.

> "Under the English common law, a police officer had power without a warrant to arrest persons committing a misdemeanor in the officer's presence and persons whom the officer had reasonable cause to believe had committed a felony. This rule, which had its origin in the ancient formative period of the common law, was firmly established at the time of the adoption of the Fourth Amendment."

Trupiano v. United States, 345 U.S. 699, 713 (Vinson, C.J. dissenting) (1948). Even prior to Trupiano, the reasoning behind the felony/misdemeanor distinction

was discussed by the Court. In Carroll v. United States, 267 U.S. 132 (1925) this Court stated:

> "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace ... while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant (citation omitted)."

Carroll v. United States, 267 U.S. at 157.

Warrantless daylight arrests in public places were upheld in United States v. Watson, 423 U.S. 411 (1976). Sanction by this Court of such arrests was predicated on the felony status of the offense. A "constitutional standard" was recognized that a warrantless arrest may be made "where there are reasonable grounds to believe that the person to be arrested has committed a felony."

United States v. Watson, 423 U.S. at 417. The dissent in Watson exposed the importance of the felony/non-felony distinction. Justice Marshall, dissenting, acknowledged the common law rule that a warrantless arrest may be made for a felony upon probable cause. Justice Marshall argued, however, that the definition of "felony" has changed.

> "Only the most serious crimes were felonies at common law, and many crimes now classified as felonies under federal or state law were treated as misdemeanors"

United States v. Watson, 423 U.S. at 439, 440.

The clear language of Watson, both majority and dissent, shows that this Court has never authorized the warrantless arrest of a non-felony suspect for an offense committed outside the presence of the officer. No such arrests have ever been authorized, even in public places, in broad daylight.

Respondent would mutilate the Fourth Amendment by giving beat officers the right to barge literally into our bedrooms for lesser law violations than even misdemeanors.

Notwithstanding its status as a non-criminal offense, drunk driving is a serious problem. No one disputes the "well documented" "carnage caused by drunk drivers". South Dakota v. Neville, ___ U.S. ___, 103 S.Ct. 916, 920, 74 L.Ed.2d 748, 51 U.S.L.W. 4148, (February 22, 1983).

Nevertheless, the people of Wisconsin have chosen to designate drunk driving as a non-jailable offense and to designate repeat offenses as misdemeanors. Wis. Stat. §346.63(1), 346.65(2). In a different context, this Court has addressed the importance and meaning of society's determination of the maximum

possible penalty for a particular violation.

> "In deciding whether an offense is 'petty', we have sought objective criteria reflecting the seriousness with which society regards the offense, ... and we have found the most relevant such criteria in the severity in the maximum authorized penalty."

Baldwin v. New York, 399 U.S. 66, 68 (1970) (citations omitted).

> "The penalty authorized by law of the locality may be taken 'as a gauge of its social and ethical judgements' ... of the crime in question."

Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (citation omitted).

It would be wholly inappropriate for this Court to make a "drunk driving exception" to the rule forbidding non-felony warrantless arrests for violations which occur outside the officer's presence. That issue, however, need not be reached in this case. Here, the

walls of the private residence protect the individual even from a warrantless felony arrest absent a "compelling need" for an immediate entry. Payton v. New York, 445 U.S. 573 (1980), Michigan v. Tyler, 436 U.S. 499, 509 (1978).

The governmental interest which could be served by allowing the police to arrest alleged drunk drivers at home in their beds is not concurrent with or equal in magnitude to the public interest in generally getting drunk drivers off the road. The only possible value in allowing officers to violate the sanctity of a suspect's home is the incremental additional ability to prosecute those few people who may be arrested in this unusual manner. Although there should be grave concern that this police tactic will be used all too often, the effect on society's ability to

protect itself from drunk drivers must be minimal.

Ironically, had the officer in this case sought a warrant for the arrest of Mr. Welsh upon the non-criminal charge of driving while intoxicated, no such warrant could have been legally issued. Wisconsin's criminal procedure code requires that a summons be used instead of an arrest warrant where the maximum possible penalty is six months imprisonment or less. Wis. Stat. §968.04(2)(b). Wisconsin's traffic code requires that, for issuance of warrants, the criminal code provisions be followed. Wis. Stat. §345.21(1).

The relevant statutes have remained unchanged since the time of Mr. Welsh's arrest, and are set forth below:

> 345.21 AUTHORITY TO ARREST WITH A WARRANT. (1) A person may be arrested for the violation of a traffic regulation

> with a warrant that substantially complies with ch. 968. Except as provided in sub. (2), the person arrested shall be brought without unreasonable delay before a court having jurisdiction to try the action or a judge.

Wis. Stat. §345.21(1).

> 968.04 WARRANT OR SUMMONS ON COMPLAINT.
>
> . . .
>
> (2)(b) In misdemeanor actions where the maximum imprisonment does not exceed 6 months, the judge shall issue a summons instead of a warrant unless he believes the defendant will not appear in response to a summons.

Wis. Stat. §968.04(2)(b).

To allow government agents to accomplish without judicial scrutiny what would be unavilable by court order would be perverse.

Even under Justice White's dissenting opinion in Payton v. New York, 445 U.S. 573, 603 (1980), which would have established four independent

requirements for the validity of home arrests, the entry here would be unconstitutional.

> "These four restrictions on home arrests — felony, knock and announce, daytime, and stringent probable cause — constitute powerful and complimentary protections for the privacy interests associated with the home. The felony requirement guards against abusive or arbitrary enforcement and ensures invasions of the home occur only in case of the most serious crimes. The knock-and-announce and daytime requirements protect individuals against the fear, humiliation, and embarrassment of being aroused from their beds in states of partial or complete undress. And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling."

Payton v. New York, 445 U.S. at 616, 617.

Although probable cause is not an issue on this appeal, it is doubtful whether Justice White's "stringent probable cause" is supported in the

record below. State v. Welsh, 108 Wis. 2d 319 at 345-352, 321 N.W.2d 245, 258-262 (1982)(Abrahamson, J., dissenting). It is undisputed that this arrest was not for a felony and not during daytime. Furthermore, the officers did not allow Mr. Welsh to surrender at his front door and nothing was done to protect him from the "embarrassment of being aroused from" his bed in a state of complete undress.

Under these circumstances, the hope of preserving a bit of evidence for a forfeiture action trial cannot overcome the presumption that the warrantless entry was unreasonable.

III. THE PEOPLE WOULD BE STRIPPED OF THEIR EXPECTATION OF PRIVACY IN THE HOME WERE WARRANTLESS ENTRIES ALLOWED FOR NON-CRIMINAL ARRESTS.

A United States Supreme Court decision upholding the validity of Mr. Welsh's arrest would shatter the Fourth Amendment. Police could enter any home at any time of the day or night looking for evidence which might disappear if they didn't act quickly.

Agents of government will swiftly find "exigencies" in almost any situation. An immediate home entry might be required to learn the identity of an individual observed driving a vehicle in excess of posted limits, or someone who had been seen by a third party spitting on the sidewalk. The officer will maintain that, absent an immediate identification, the suspect would change clothes and the valuable evidence would be lost.

Governmental bodies or public interest groups may place advertisements on television and in newspapers suggesting that citizens "turn in a drunk driver". Good Samaritans would get the license number of a vehicle driven erratically and call the "drunk driving hot line". After learning the witness' story, police might well invade the home of the person to whom the vehicle is registered. Would the officers stand at the front door and request to meet the vehicle owner? At the Welsh home, they barged right in. Affirmance of the court below would authorize regular nighttime room-to-room home searches by officers seeking drunk driving suspects.

In balancing any warrantless governmental intrusion onto private property, the measuring begins with the scales tipped in favor of privacy. Added to this is the weight of the

special protection afforded by a personal residence, for the balancing required in this case.

On the other side of the scale is placed the "public interest" to be served by allowance of such nighttime home searches and seizures. But on these facts the scales never move.

> "[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home."

Jones v. United States, 357 U.S. 493, 498 (1958).

The privacy interests are so strong and the public value of the intrusion is so minimal that the balance cannot be tipped. The right of privacy must prevail.

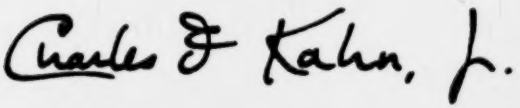
CONCLUSION

The Wisconsin Civil Liberties Union Foundation supports the position of petitioner Edward G. Welsh.

The relief we are seeking is reversal of the Wisconsin Supreme Court and remand of the case to the trial court.

Respectfully submitted,

WISCONSIN CIVIL LIBERTIES UNION FOUNDATION



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April 21, 1983

No. 82-5466-CSX
Status: GRANTED

Title: Edward G. Welsh, Petitioner
v.
Wisconsin

Docketed:
September 27, 1982

Court: Supreme Court of Wisconsin

Counsel for petitioner: Baldwin, Gordon Brewster

Counsel for respondent: Kleinmaier, Stephen W.

Entry	Date	Note	Proceedings and Orders
1	Sep 27 1982	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Oct 28 1982		DISTRIBUTED. November 12, 1982
4	Nov 9 1982	F	Response requested.
5	Dec 8 1982		Brief of respondent State of Wisconsin in opposition filed.
6	Dec 9 1982		DISTRIBUTED. January 7, 1983
7	Dec 20 1982	X	Reply brief of petitioner Edward G. Welsh filed.
9	Jan 10 1983		REDISTRIBUTED. January 14, 1983
11	Jan 17 1983		REDISTRIBUTED. January 21, 1983
13	Feb 14 1983		REDISTRIBUTED. February 18, 1983
21	Feb 22 1983		Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari GRANTED.
			**********
23	Mar 17 1983		Order extending time to file brief of petitioner on the merits until April 25, 1983.
24	Apr 7 1983		Joint appendix filed.
25	Apr 20 1983		Brief of petitioner filed.
26	Apr 22 1983		Brief amicus curiae of Wisconsin Civil Liberties Un. filed.
28	May 11 1983		Order extending time to file brief of respondent on the merits until June 24, 1983.
29	Jun 22 1983		Brief of respondent Wisconsin filed.
30	Jul 5 1983		Record filed.
31	Jul 8 1983		CIRCULATED.
33	Aug 4 1983	X	Reply brief of petitioner filed.
34	Aug 15 1983		SET FOR ARGUMENT. Wednesday, October 5, 1983. (4th case)
35	Oct 5 1983		ARGUED.